(29,840)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 530

JAMES COX DAVIS, AS THE AGENT OF THE PRESIDENT, ETC., PLAINTIFF IN ERROR,

vs.

MARION C. SLOCOMB, AS ADMINISTRATRIX OF THE ESTATE OF WILSON M. SLOCOMB, DECEASED

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Superior Court of the State of Washington for King County.

No. 6210.

No. 152,695.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of "The Transportation Act, 1920,"

Defendants.

Complaint.

Plaintiff for complaint against the defendants alleges:

I.

That the plaintiff is the duly appointed, qualified and acting administratrix of the estate of Wilson M. Slocomb, deceased.

II.

That the Great Northern Railway Company is a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, and was and is a common carrier of passengers and freight for hire, and was and is the owner and operator of a certain railroad, together with tracks,

rolling stock and other appurtenances thereunto belonging, extending from the City of Seattle in the State of Washington to the City of St. Paul in the State of Minnesota, and passing through the town of Monitor in the State of Washington.

III.

That on the 27th day of November, 1919, the said Great Northern Railroad's system of railroads was being operated by Walker D. Hines, Director General of the Railroads of the United States of America under an Act of Congress of August 29, 1916, as a common carrier of freight, passengers, mail and express for hire between the said cities of Seattle and St. Paul and through [2*] said town of Monitor, as aforesaid.

IV.

That the defendant James Cox Davis is the agent of the United States of America designated by the President as the agent against whom suits should be brought pursuant to Section 206 of the Transportation Act, approved February 28, 1920, upon claims arising while said railroad was being operated by the Director General of Railroads under the Act of Congress dated August 29, 1916.

V.

That the defendant the Great Northern Railway Company maintains three railroad tracks running in a southeasterly direction through said town of Monitor. That the main thoroughfare and public highway between the city of Cashmere and

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*Page-number appearing at foot of page of original certified Transcript of Record.

the city of Wenatchee runs through and crosses said railroad tracks at the town of Monitor and is the principal street through said town. That said public highway, as it approaches the town of Monitor from the Northwest, runs parallel to said tracks for about 40 rods and, just before crossing said tracks, turns and runs easterly and crosses said tracks in a diagonal direction and at an angle of approximately 40 degrees. The most southerly of said tracks is known as the industrial track, the center track as the pass track, and the northerly track as the main track.

That there are a number of large connecting warehouses extending from said crossing in a northwesterly direction between said industrial track and said highway for a distance of approximately 419.26 feet, totally cutting off all view of said tracks from vehicles passing easterly over said public highway for a distance of 419.26 feet immediately before crossing said tracks.

That at the time the said Wilson M. Slocomb was killed at said crossing, the defendants kept a large number of boxcars standing upon said industrial track extending in a southeasterly direction beyond the easternmost end of said warehouses to almost the center of said public highway on the northwesterly side thereof, [3] obscuring the running tracks of said defendants to the northwesterly until vehicles had passed entirely over the first of said three tracks in traveling east. That the main running track of the defendants approaching said town of Monitor from the northwest, shortly before

it reaches the westernmost end of said warehouses, turns and curves sharply from a northerly direction to a southeasterly direction and runs parallel with said warehouses as it crosses said highway. That the east-bound trains over said track cannot be seen until they are within a short distance from said crossing.

That the defendants' said tracks, at said crossing at the time the said Wilson M. Slocomb was killed thereon, were planked with rough planks for about one foot on the inside of each of said rails and about one foot on the outside of each of said rails, leaving a space between the center of each of said tracks and between each of said planks unplanked and unpaved and at places in said roadway approximately 3 to 6 inches below the level of the rails of said tracks and the planking along either side thereof. That said public highway between the defendants' said tracks and on which vehicles were compelled to travel in passing over said tracks, was cut and worn into ruts, check-holes and depressions and was rough, dangerous and difficult for vehicles to be driven over. That said public highway crossing said railroad tracks is the main thoroughfare through said town of Monitor and is travelled very extensively.

That on the 27th day of November, 1919, the said Wilson M. Slocomb, deceased, was invited to ride and go with Cecil W. Slocomb and Glen Long in an automobile from his residence, which is situated about 40 rods in a northwesterly direction from said crossing and on the southerly side of said main

track, to the said city of Wenatchee. That said automobile was owned and driven by Cecil W. Slocomb. In passing over said public highway, which runs close along the southerly side of said large warehouses lying between [4] said public highway and said railroad tracks to the northwest of said crossing, the view of said tracks was entirely cut off from the occupants of said automobile and said boxcars extending along the northerly side of said warehouses and into said public highway prevented the occupants of said automobile from seeing east-bound trains approaching said crossing until after they had passed over the first of said tracks. That before driving upon the first of said defendants' tracks from the west, the said Cecil W. Slocomb stopped his said automobile, which he was driving and in which the said Wilson M. Slocomb and Glen Long were riding, and they all looked and listened for the approach of any east-bound or west-bound trains upon said tracks, and did not see any train or hear any noise, whistle or bell, although the sight and hearing of each of the said occupants of said automobile were good. That the boxcars of the defendants standing upon said industrial track extending into said public highway at said crossing from the northwest side thereof, leaving scarcely sufficient space of said highway for automobiles to travel over in crossing said tracks, and cut off the view from said main tracks in a northwesterly direction.

That after having stopped, looked and listened at said crossing for the approach of any train, and after having driven from the northwest upon said highway for a distance of almost 40 rods and alongside of said railroad tracks without having seen or heard the approach of any east-bound train, the said Cecil W. Slocomb proceeded to drive the said machine across said tracks in a careful and cautious manner, at a rate of speed not to exceed five miles an hour, over the rough highway, which necessitated his constant attention to the driving of his said automobile in order to steer his machine clear of said ruts and depressions and up and over the defendants' said tracks. That said automobile was what is generally known as a Chevrolet roadster and a left-hand drive machine. That in crossing said tracks Cecil W. Slocomb was [5] sitting to the westerly or northwesterly side in said machine, Glen Long was sitting in the center of the seat, and the decedent Wilson M. Slocomb to the right in said seat, and by reason thereof was unable to see the approach of any east-bound train. That as said automobile was being driven over said crossing as aforesaid, and while the hind wheels of said machine were still inside the last rail of said running track, an east bound passenger train, known as the Great Northern east-bound train No. 26, struck said automobile in which the decedent Wilson M. Slocomb was riding, while running at a very high and excessive rate of speed, and threw said automobile and Cecil W. Slocomb, Glen Long, and the decedent Wilson M. Slocomb high in the air and

for a distance of about 100 to 130 feet and against the platform and station house of said railway company at Monitor, and killed each of them.

VI.

That the said injuries to and the killing of the said Wilson M. Slocomb were caused wholly and approximately by the carelessness and negligence of the defendants, without any fault on the part of said decedent Wilson M. Slocomb, as follows, to wit:

(a) Defendants were negligent in causing said train to be run at a high and excessive and dangerous speed upon a slightly down grade through said town of Monitor and across its said public highway and street where many pedestrians, automobiles and conveyances were in the habit of crossing almost constantly.

(b) That the defendants carelessly and negligently failed to cause the bell upon the locomotive to ring or the whistle upon said locomotive to be sounded before crossing the said public highway and principal street in said town of Monitor. [6]

(c) That defendants carelessly and negligently allowed and permitted a large number of freight-cars to remain standing upon their said industrial track in said town of Monitor upon the northwesterly side of said public highway and street crossing said tracks, leaving scarcely sufficient width remaining of said highway for an automobile to drive over in crossing said track, whereby the view of said approaching train was shut off until said automobile had crossed the first of said tracks, and that

neither said Wilson M. Slocomb nor Cecil W. Slocomb, who was driving said machine, nor Glen Long, who was also riding in said machine, had any knowledge or intimation whatsoever of the approach of said train either by whistle, bell, sound or otherwise, in time to prevent said train's colliding with said automobile and striking and killing said Wilson M. Slocomb.

(d) That the said defendants carelessly and negligently allowed and permitted said public highway in crossing its said right of way and tracks at Monitor to get out of repair and become rough, rutty, difficult, dangerous and hard to drive vehicles over, and failed and neglected to plank said highway between said tracks and rails and requiring close and additional attention and care on the part of drivers of automobiles and vehicles in driving over the same and to give close and additional attention to the driving of their automobiles and vehicles in order to avoid breaking and damaging the same and injuring the occupants riding therein, which condition of said crossing had remained as stated for a long time prior to the 27th day of November, 1919, and of which the defendants had been frequently notified and had been requested to repair and had full knowledge and notice thereof.

(e) That it was the custom of the defendants for a long time prior to said 27th day of November, 1919, to permit said empty freight boxcars to stand and remain upon its side tracks at [7] Monitor as aforesaid, leaving only sufficient space for a machine or vehicle to pass over and around the end

of said cars. That there were and are also a number of warehouses situated along the tracks of the said railway company near said crossing and upon either side thereof, so that the view of anyone approaching said crossing from a westerly or northwesterly direction is obstructed for 500 feet or more, and that northerly or westerly of said highway crossing the tracks turn abruptly to the north, so that trains coming from the west cannot be seen at said crossing until within a distance of about 25 rods, and that, by reason of the premises, said crossing was on the 27th day of November, 1919, and for a long time prior thereto, an exceptionally dangerous crossing, concerning all of which the defendants had been frequently notified and had full knowledge and notice. And, notwithstanding, the defendants carelessly and negligently failed to employ a watchman or to install gates or gongs or any other device at said crossing for the safety of persons crossing said tracks at said point, and that said street in said town of Monitor is a public highway connecting the towns of Cashmere and Wenatchee and is used constantly and extensively at that point by pedestrians, automobiles and other vehicles.

(f) That the defendants carelessly and negligently omitted and neglected to take any steps to check or stop its said train after first seeing that the said automobile in which the decedent Wilson M. Slocomb was riding was in the act of crossing said tracks, although sufficient time elapsed from the time the engineer in charge of said train first

saw said automobile upon said crossing and about to cross the last of its said tracks to have permitted the stopping [8] of the said train and to have avoided the striking of said automobile and the killing of the said Wilson M. Slocomb; and, notwithstanding said fact, the defendants wholly failed and neglected to take any steps toward avoiding said collision after seeing and knowing the dangerous position which said automobile was in, in which the deceased Wilson M. Slocomb was riding.

VII.

That the said Wilson M. Slocomb, at the time of his death, was the husband of Marion C. Slocomb, was forty-three years of age, was an experienced orchardist, and prior to said collision was a healthy, able-bodied man able to earn and was then earning the sum of *Seven Thousand Five Hundred* Dollars (75,000.00) per year net, was a prudent, kind and affectionate husband, and had a reasonable expectancy of life and of continuing to earn said sum and more for the full period of twenty-five years.

VIII.

That the said Wilson M. Slocomb left surviving him his widow, the plaintiff, Marion C. Slocomb, who was wholly dependent upon the earnings of the said Wilson M. Slocomb for her livelihood, and that by his death she has lost her sole means of support and maintenance, his further earnings and accumulations, his foresight and management, and has been deprived of his comfort and society, his advice, counsel and oversight as a husband, and that the plaintiff, in her own behalf and as administratrix of

said estate, has been injured and damaged in the premises, and by reason of the carelessness and negligence of each of the defendants, as herein alleged, in the full sum of Seventy-Five Thousand Dollars ($75,000.00). [9]

WHEREFORE plaintiff demands judgment against the defendants in the full sum of Seventy-five Thousand Dollars ($75,000.00), together with her costs and disbursements herein.

WM. MARTIN and
H. A. MARTIN,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

Marion C. Slocomb, being first duly sworn, on oath deposes and says:

That she is the administratrix of the estate of Wilson M. Slocomb, deceased, and the plaintiff in the above-entitled action; that she has read the foregoing complaint, knows the contents thereof and believes the same to be true.

MARION C. SLOCOMB.

Subscribed and sworn to before me this 9th day of July, 1921.

[Notarial Seal] H. A. MARTIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed Jul. 29, 1921. George A. Grant, Clerk. By R. W. Flemming, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Aug. 29, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

In the Superior Court of the State of Washington for King County.

No. 152,695.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of "The Transportation Act, 1920,"

Defendants.

Summons.

The State of Washington to the Said JAMES COX DAVIS, Defendant: *Defendant*

You are hereby summoned to appear, within twenty (20) days after the service of this summons upon you, exclusive of the day of service, and defend the above-entitled action in the Superior Court of the State of Washington for King County aforesaid; and answer the complaint of the plaintiff and serve a copy of your answer upon the undersigned attorney for plaintiff, at his office below stated; and in case of your failure to do so, judgment will be ren-

dered against you according to the demand of the complaint, which will be filed with the Clerk of said Court (a copy of which is herewith served upon you).

WM. MARTIN and
H. M. MARTIN,
Attorneys for Plaintiff.

P. O. Address:
609-611 Lowman Building,
County of King, State of Washington.

State of Washington,
County of King,—ss.

Jeretta Blue, being first duly sworn, upon oath deposes and says: That at all times hereinafter mentioned I was and am now a citizen of the United States and of the State of Washington, and a resident of King County, in said State, above the age of twenty-one years, not a party to or in any way interested in the within named action, and competent to be a witness therein; that I received the within summons on the 12th day of July, 1921, and that on the 12th day of July, 1921, I duly served the same upon James Cox Davis, he being the defendant named in said summons, delivering to and leaving with Hannah S. Johnson, the agent of the said defendant [11] James Cox Davis, as agent, as aforesaid, personally in said King County a copy of said summons, together with a copy of the complaint in said action.

JERETTA BLUE.

Fees: Services $——

Subscribed and sworn to before me this 28th day of July, A. D. 1921.

H. A. MARTIN.

Notary Public in and for the State of Washington, Residing at Seattle, Wash.

Filed Aug. 2, 1921. George A. Grant, Clerk. By R. A. Flemming, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 29, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [12]

United States District Court for the Western District of Washington.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of The Transportation Act, for 1920,
Defendants.

Appearance of Attorneys for Plaintiff.

To the Clerk of the Above-entitled Court:

You will please enter our appearance as attorneys for plaintiff in the above-entitled cause, and ser-

vice of all subsequent papers, except writs and process, may be made upon said plaintiff, by leaving the same with said attorneys.

WM. MARTIN,
H. A. MARTIN,

Office Address: 609–611 Lowman Building, Seattle, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 13, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

In the Superior Court of the State of Washington in and for the County of King.

No. 152,695.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY, COMPANY, a Corporation, and JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of The Transportation Act of 1920,

Defendants.

Petition for Removal of Cause to United States District Court.

To the Presiding Judge of the Above-entitled Court:

Your petitioners, Great Northern Railway Company, a corporation, and James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, respectfully represent and show to your Honor:

I.

That your petitioners are the defendants in the above-entitled cause; that said cause is a suit of a civil nature at law; that the matter in controversy in said action exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000); that said suit arises under the constitution and laws of the United States, to wit, the Act of Congress approved August 29, 1916, entitled "An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June 20, 1917, and for other purposes," the Proclamation of the President, dated December 26, 1917, taking over all railroads and placing the same under Federal Control, pursuant to said act of June 20, 1917, the act of Congress [14] approved March 21, 1918, "An Act to provide for the operation of transportation systems while under Federal Control, for the just compensation to their owners, and for other purposes," and the Proclamation of the President, heretofore made,

appointing the defendant, James Cox Davis, as the Agent of the United States under and in pursuance of the Transportation Act of 1920.

II.

That the above-entitled cause was instituted in the above-entitled court by the above-named plaintiff against the defendants, on July 12, 1921, by the service of a summons and complaint, wherein the plaintiff prays judgment against said defendants for the sum of seventy-five thousand dollars ($75,000) damages for the death of Wilson M. Slocomb, as the result of a collision between an automobile in which the said Wilson M. Slocomb was riding and a train operated by the defendant, James Cox Davis, or his predecessor in office, as Director General of Railroads for the United States, over the line of the railroad known as the Great Northern Railroad, in the Town of Monitor, Chelan County, Washington, on November 27th, 1919.

III.

That the railroad on which the said accident occurred and the said death resulted is owned by the Great Northern Railway Company, a corporation, but that at the time of the accrual of said cause of action said line of railroad was in the possession, use and control of the United States of America, and was being operated by the defendant, James Cox Davis, or his predecessor in office, as Director General of Railroads of the United States of America under and by virtue of the acts of Congress and the Proclamations hereinabove referred to. [15]

IV.

That this suit is, and at all times since the commencement thereof, has been entirely between citizens of different states; that the plaintiff was at the time of the commencement of this case, ever since has been, and now is a citizen, resident and inhabitant of the State of Washington, and not of any other state; that the Great Northern Railway Company, a corporation, the owner of the line of railroad on which the plaintiff's injury is alleged to have occurred, was at all of said times and still is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business in St. Paul in said state, and a citizen, resident and inhabitant of said State of Minnesota, and not of the State of Washington; that the defendant, James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, is, and at all times herein mentioned has been a citizen, resident and inhabitant of the State of Illinois, and not of the State of Washington; that the said Great Northern Railway Company and James Cox Davis, as Agent of the United States of America under the Transportation Act of 1920, are actually interested in said controversy; that this action is transferable to the United States District Court upon the petition of the said Great Northern Railway Company, a corporation, but that said Great Northern Railway Company, a corporation, is improperly joined as a defendant herein, and that even though the said

Great Northern Railway Company is improperly joined as a defendant in this cause, that this action, but for the Federal Control of the line of railroad owned by the Great Northern Railway Company would have been transferable to the [16] United States District Court upon petition of the said Great Northern Railway Company.

V.

That your petitioners desire to remove this cause from the Superior Court of the State of Washington in and for the County of King to the District Court of the United States for the Western District of Washington, Northern Division, and offer and file herewith a bond, with good and sufficient surety, conditioned as required by law, for their entering in said District Court, within thirty days from the date of the filing of this petition, a certified copy of the record in said suit, and for paying all costs that may be awarded by said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioners pray that said surety and bond be accepted, and that this cause may be removed to the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United States in such case made and provided, and that no further proceedings be had herein in this court, except to make an order of removal herein.

And your petitioners, as in duty bound, will ever pray.

JAMES COX DAVIS,
As Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,
By THOMAS BALMER,
EDWIN C. MATTHIAS,
His Attorneys.

GREAT NORTHERN RAILWAY COMPANY,
By THOMAS BALMER,
EDWIN C. MATTHIAS,
Its Attorneys. [17]

State of Washington,
County of King,—ss.

Edwin C. Matthias, being first duly sworn, on oath deposes and says that he is one of the attorneys for the defendants, James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, and the Great Northern Railway Company, a corporation, petitioners above named; that he has read the foregoing petition; knows the contents thereof, and verily believes the same to be true.

That the said petitioners are absent from and nonresidents of the State of Washington, and this verification is therefore made in their behalf by affiant as their attorney.

EDWIN C. MATTHIAS.

Subscribed and sworn to before me this 1st day of August, 1921.

[Notarial Seal] H. F. JOHNSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

The foregoing petition, together with a good and sufficient bond, properly conditioned with good and sufficient surety, was presented to me in open court this 1st day of August, 1921.

CALVIN S. HALL,
Judge.

Filed Aug. 1, 1921. George A. Grant, Clerk. By R. W. Flemming, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 29, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

United States District Court for the Western District of Washington.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corp., and JAMES COX DAVIS, as the Agent Designated by the President of the U. S. Under and in Pursuance of the Transportation Act, 1920.

Appearance of Attorneys for Defendant.

To the Clerk of the Above-entitled Court:

You will please enter our appearance as attorneys for defendant in the above-entitled cause, and service of all subsequent papers, except writs and process, may be made upon said Great Northern Railway Co. and James Cox Davis, by leaving the same with Thomas Balmer, Edwin C. Matthias, Office Address 302 King St. Pass. Station, Seattle, Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 29, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

In the Superior Court of the State of Washington, for King County.

No. 152,695.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corp., and JAMES COX DAVIS, as the Agent Designated by the President of the U. S. Under and in Pursuance of "The Transportation Act, 1920,"

Defendants.

Notice of Presentation of Petition for Removal.

To the Above-named Plaintiff and to Messrs. William Martin and H. A. Martin, Your Attorneys.

You, and each of you, will please take notice, that on Monday, the first day of August, 1921, the defendants, Great Northern Railway Company, a corporation, and James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of "The Transportation Act, 1920," will file in the above-entitled court, and on said date at three (3) o'clock P. M., will present to the presiding Judge of the above-entitled court in his courtroom at the courthouse in King County, Washington, their petition and bond for removal in the above-entitled action to the District Court of the United States for the Western District of Washington, Northern Division, a copy of which petition and bond are hereunto annexed and herewith served upon you.

Dated at Seattle, Washington, this 1st day of August, 1921.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant. [20]

Service of the foregoing notice and the receipt of a true copy thereof, together with a true copy of the petition and bond therein referred to, is admitted at Seattle, Washington, this 1st day of August, 1921, at 1:35 P. M.

WM. MARTIN,
Attorney for Plaintiff.

Filed Aug. 1, 1921. George A. Grant, Clerk. By R. W. Flemming, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 29, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the Superior Court of the State of Washington in and for the County of King.

No. 152,695.

MARION C. SLOCOMB, as Administratix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Defendants.

Bond for Removal.

KNOW ALL MEN BY THESE PRESENTS, That we, Great Northern Railway Company, a Corporation and James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, as principals, and National Surety Company, a corporation organized under the laws of the State of

New York, and authorized to do business in the State of Washington, as surety, are held and firmly bound unto Marion C. Slocomb, as administratrix of the Estate of Wilson M. Slocomb, deceased, the plaintiff in the above-entitled action, in the penal sum of One Thousand Dollars $1,000.00, lawful money of the United States, for the payment of which sum well and truly to be made, we hereby bind ourselves, and our respective successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of August, 1921.

Upon the condition, nevertheless, that,

WHEREAS, the said Great Northern Railway Company, a [22] corporation, and James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, defendants, have petitioned the Superior Court of the State of Washington, in and for the County of King, for the removal of the above-entitled cause therein pending, wherein the said Marion Slocomb, as administratrix of the estate of Wilson M. Slocomb, deceased, is plaintiff, and the Great Northern Railway Company, a corporation, and James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, are defendants, to the District Court of the United States for the Western District of Washington, Northern Division;

Now, if the said Great Northern Railway Company, a corporation, and James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, shall enter in the District Court of the United States for the Western District of Washington, Northern Division, within thirty (30) days from the date of the filing of this petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said District Court, if the said District Court shall hold that the said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall be and remain in full force and effect.

GREAT NORTHERN RAILWAY COMPANY.

By THOMAS BALMER,
EDWIN C. MATTHIAS,
Its Attorneys.

[Corporate Seal] NATIONAL SURETY COMPANY.

By ROBT. C. WHYTE,
Attorney in Fact.

JAMES COX DAVIS,
As the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920.

By THOMAS BALMER,
EDWIN C. MATTHIAS,
His Attorneys. [23]

Filed Aug. 1, 1921. George A. Grant, Clerk. By R. W. Flemming, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 29, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

In the Superior Court of the State of Washington for King County.

No. 152,695.

MARION C. SLOCOMB, as Administratix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act, 1920,

Defendants.

Order of Removal to Federal Court.

This cause coming on duly and regularly to be heard on this 1st day of August, 1921, upon the petition of Great Northern Railway Company, a corporation, and James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of "The Transportation Act, 1920," the defendants herein, for the removal of

said cause from this court to the United States District Court for the Western District of Washington, Northern Division; and it appearing to the Court that written notice of the filing and presentation at this time of said petition and of the bond for removal herein has been given to the plaintiff prior to the filing thereof; and it now appearing to the Court from said petition that said suit arises under the constitution of the United States and is entirely between citizens of different states, to wit, between the plaintiff, who is a citizen of the State of Washington, and the defendant, Great Northern Railway Company, a corporation, which is a citizen of the State of Minnesota, and the defendant, James Cox Davis, who is a citizen of the State of Illinois, and that the amount [25] in controversy in said action exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000.00), and that said defendants are actually interested in said controversy; and it is further appearing to the court that this suit, if brought against the Great Northern Railway Company alone, would, but for the Federal control of its line of railroad, have been transferable on its petition to the United States District Court, and the petitioners having filed and tendered with their said petition a bond with good and sufficient surety in the sum of one thousand dollars ($1,000.00), conditioned as required by law; and it appearing to the Court by said petition that said petitioners are entitled to the removal prayed for and that said petition was presented in due time;

IT IS ORDERED that said bond of the petitioner and the surety thereon be, and the same are hereby approved.

IT IS FURTHER ORDERED that this Court proceed no further in this cause and that the same be, and hereby is removed to the District Court of the United States for the Western District of Washington, Northern Division, and that the Clerk of this court be, and he is hereby ordered and directed to make up a record herein and to certify the same and transmit the same to the Clerk of the United States District Court for the Western District of Washington, Northern Division, within thirty (30) days from the date of the filing of said petition.

Done in open court this 1st day of August, 1921.

CALVIN S. HALL,
Judge.

Filed Aug. 1, 1921. George A. Grant, Clerk. By Benj. T. Hart, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 29, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Defendants.

Demurrer of Great Northern Railway Company.

COMES NOW the defendant, Great Northern Railway Company, above named, and demurs to the complaint heretofore served and filed herein, on the following grounds:

I.

That the Court has no jurisdiction of the person of the defendant, or of the subject matter of the action.

II.

That the plaintiff has no legal capacity to sue.

III.

That there is another action pending between the same parties for the same cause.

IV.

That there is a defect of parties plaintiff or defendant.

V.

That several causes of action have been improperly united.

VI.

That the complaint does not state facts sufficient to [27] constitute a cause of action.

VII.

That the action has not been commenced within the time limited by law.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant, Great Northern Railway Company.

We hereby acknowledge service of the foregoing demurrer of deft. G. N. Ry. Co., and the receipt of a true copy thereof, this 26 day of September, 1921.

H. A. MARTIN and
WM. MARTIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 26, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a Corporation, and JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act, 1920,

Defendants.

Order Sustaining Demurrer of Defendant, Great Northern Railway Company.

This matter coming regularly on for hearing before the court on the demurrer of the defendant, Great Northern Railway Company to plaintiff's complaint, and the court being duly advised in the premises, and the matter having been submitted to the court without argument,—

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the demurrer of the defendant, Great Northern Railway Company, be, and the same is hereby sustained, and the Great Northern Railway Company is hereby dismissed as a party defendant herein, without costs.

Done in open court this 22d day of October, 1921.

EDWARD E. CUSHMAN,
Judge.

O. K.—WM. MARTIN.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 22, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Defendant.

Answer.

Comes now the defendant above named, and makes the following answer to plaintiff's complaint:

I.

Answering paragraph I thereof defendant alleges that he does not have sufficient information to form

a belief, and therefore denies each and every allegation, matter and thing therein contained.

II.

Answering paragraph II defendant denies that the Great Northern Railway Company was operating a certain railroad between the cities of Seattle, Washington and St. Paul, Minnesota, and passing through the town of Monitor, Washington, or any railroad at the time alleged in the complaint.

III.

Answering paragraph V the defendant admits that three railroad tracks owned by the Great Northern Railway Company run in a southeasterly direction through the Town [30] of Monitor, and that a public highway running between the City of Cashmere and the City of Wenatchee crosses said Railroad tracks in the town of Monitor. Admits that there are a number of warehouses along said railroad tracks in the town of Monitor; admits that at the time Wilson M. Slocomb was killed there were some boxcars standing on the siding at some of the said warehouses; admits that on the 27th day of November, 1919, Wilson M. Slocomb was riding in an automobile along the said highway which runs from Cashmere to the city of Wenatchee and through the Town of Monitor, and was crossing the said railroad tracks when his automobile collided with a train operated by the defendant, resulting in the death of said Wilson M. Slocomb, and denies each and every other allegation, matter and thing therein contained.

IV.

Answering paragraph VI defendant denies each and every allegation, matter and thing therein contained.

V.

Answering paragraph VII defendant denies each and every allegation, matter and thing therein contained.

VI.

Answering paragraph VIII defendant denies each and every allegation, matter and thing therein contained, and specifically denies that the plaintiff has been injured and damaged in the sum of seventy-five thousand dollars ($75,000) or in any sum whatever.

For a further, separate and first affirmative defense to plaintiff's cause of action, defendant alleges that if the deceased met his death as in plaintiff's complaint [31] alleged, the injuries resulting in deceased's death and his death resulted from the negligent acts and omissions of the deceased himself, and the deceased by his own negligent acts and omissions directly contributed to his death.

For a further, separate and second affirmative defense to plaintiff's complaint the defendant alleges that at the time of said collision the deceased, his son Cecil W. Slocomb, and an employee of deceased named Glen Long were the only occupants of said automobile; that the automobile was the property of deceased, and that at the time of the collision the occupants of the said automobile

were engaged in a joint and common enterprise, and if deceased met his death as the result of said collision, his death resulted from the negligent acts and omissions of deceased's son, Cecil W. Slocomb and deceased's employee Glen Long, which combined with the negligent acts and omissions of deceased himself, directly contributed to deceased's death.

WHEREFORE, plaintiff prays that this action be dismissed, and that it have and recover of the plaintiff his costs to be taxed.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant. [32]

State of Washington,
County of King,—ss.

Edwin C. Matthias, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant, James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true; that said defendant, James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, is absent from and a nonresident of the State of Washington, and affiant therefore makes this verification in his behalf.

EDWIN C. MATTHIAS.

Subscribed and sworn to before me this 14th day of November, 1921.

[Notarial Seal] H. F. JOHNSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

We hereby acknowledge service of the foregoing answer and the receipt of a true copy thereof, this 14 day of November, 1921.

WM. MARTIN (JB.),
Attorney for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 14, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [33]

In the United States District Court for the Western District of Washington, Northern Division

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Defendant.

Reply.

Comes now the plaintiff and for reply to the answer of the defendant herein says:

I.

That she denies each and every allegation contained in the further, separate and first affirmative defense to plaintiff's cause of action set forth in defendant's answer.

II.

That she denies each and every allegation contained in the further, separate and second affirmative defense to plaintiff's complaint contained in defendant's answer, except that she admits that plaintiff's son, Cecil W. Slocomb, deceased, Glen Long, deceased, and Wilson M. Slocomb, deceased, were the only occupants of said automobile at the time of said collision, which she admits.

WHEREFORE, plaintiff prays for judgment as heretofore prayed for in her complaint herein.

WM. MARTIN and
H. A. MARTIN,
Attorneys for Plaintiff. [34]

State of Washington,
County of King,—ss.

Wm. Martin, being first duly sworn, on oath deposes and says:

That he is attorney for the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof and believes the same to

be true, and makes this affidavit on behalf of plaintiff for the reason that she is absent from Seattle, King County, and said District.

WM. MARTIN.

Subscribed and sworn to before me this 18th day of November, 1921.

[Seal] H. A. MARTIN,

Notary Public for the State of Washington, Residing at Seattle.

Service of the within reply by delivery of a copy to the undersigned is hereby acknowledged this 21st day of November, 1921.

THOS. BALMER,
S.J.C.,
Attorney for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 21, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Defendant.

Order Permitting Complaint to be Amended by Interlineation.

On application of the plaintiff through her attorney Wm. Martin, Esq., for permission to amend her complaint, and with the consent of the defendant through its attorneys Thomas Balmer, Esq. and E. C. Matthias, Esq., that the amendment may be made,—

It is hereby ORDERED that the Clerk of the court by interlineation insert in the 7th paragraph of the plaintiff's complaint herein the words—"the husband of said Marion C. Slocomb, was"—after the first word "was" in the second line of said paragraph; and the words—"was a prudent, kind and affectionate husband"—after the word "net" in the fifth line of said paragraph; and the words

"his further earnings and accumulations, his foresight and management, and has been deprived of his comfort and society, his advice, counsel and oversight as a husband"—after the word "maintenance" in the fifth line of the 8th paragraph thereof.

Done in open court this 9th day of May, 1922.

EDWARD E. CUSHMAN,
Judge.

O. K.—THOMAS BALMER,
E. C. MATTHIAS,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 9, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [36]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of The Transportation Act of 1920,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff herein, and assess her damages in the sum of Thirteen Thousand Seven Hundred and Fifty Dollars, $13,750.00.

JAMES V. PELLETIER,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 24, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [37]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, Director General of Railroads, and Agent of the United States of America, Under The Transportation Act of 1920,

Defendant.

Petition for New Trial.

Comes now the defendant in the above-entitled cause and petitions and moves this Court to vacate

and set aside the verdict entered in said cause on the 24th day of May, 1922, and the judgment rendered thereon on the 5th day of June, 1922, and for an order directing and granting a new trial of said cause.

This motion is based upon the pleadings and papers on file in said action, upon the minutes of the Court, including the reporter's transcript of his shorthand notes of the testimony, and all other records in said action.

Said defendant states as the grounds upon which he relies, the following:

(1) Insufficiency of the evidence to justify the verdict and judgment.

(2) Error in law occurring at the trial.

(3) The jury's verdict is against the weight of the evidence, in that the weight of the evidence is [38] to the effect that the deceased, Wilson M. Slocomb, was guilty of contributory negligence as a matter of law, in the respects hereinafter set forth herein.

Defendant specifies the following particulars wherein the evidence is claimed to be insufficient:

(a) There was no evidence to warrant the jury in finding that the deceased, Wilson M. Slocomb, or the driver of the automobile for whose negligence said deceased was responsible, was in the exercise of due care and caution at the time of the collision and at the time deceased received the injuries resulting in his death. There was no evidence to warrant the jury in failing to find that the deceased, Wilson M. Slocomb, or the driver of the automobile

for whose negligence said deceased was responsible, was not in the exercise of due care and caution at the time of the collision and at the time deceased received the injuries resulting in his death, and that said want of care contributed to deceased Wilson M. Slocomb's death, as the proximate cause thereof. On the contrary, the undisputed evidence shows that deceased, Wilson M. Slocomb, or the driver of the automobile for whose negligence said deceased was responsible, was guilty of negligence which proximately contributed, as a matter of law, to the collision and to the death of said deceased, in that said automobile was driven upon the main line track on which defendant was operating a railroad train, in a careless and negligent manner, without reducing the speed of the automobile or looking or listening for an approaching train, and without stopping, if it was necessary for the occupants of the automobile to do so, in order to [39] determine whether a train was approaching; in that, even at the rate the train was going, assuming plaintiff's evidence to be true, the occupants of the automobile could have seen the approaching train if they had looked in the direction from which it was coming, and could have stopped the automobile, or turned aside, in time to have avoided the collision; in that the occupants of the automobile either saw the approaching train and tried to beat it across the track, when they could have stopped or turned aside, if they so desired, or did not look and listen for an approaching train, although they could have seen and heard the train if they had either looked

or listened, in time to have stopped and avoided the collision. The occupants of the automobile, including the deceased, Wilson M. Slocomb, were also guilty of contributory negligence in driving with three men in a two-passenger roadster, and in driving with the curtains down under those circumstances, on a clear day, without slacking speed to look or listen for an approaching train, and without stopping, if necessary, to hear or see if one were approaching.

Defendant specifies the particular errors of law occurring at the trial and relied upon in making this motion, as follows:

I.

Admission and rejection of testimony.

(a) In restricting the cross-examination of the witness, E. W. Simonson, by refusing to allow counsel for the defendants to cross-examine said witness, after said witness had testified to the effect that Cecil Slocomb was a careful and prudent driver of an automobile, [40] whether if he were riding in an automobile with another person driving, and there were three people in a one-seated roadster, and he came to a point where the road crossed three railroad tracks, and there were boxcars and warehouses on each side of the highway at the crossing, and after the driver of the automobile was clear in those obstructions at the crossing he had a clear view of the track for at least 1,000 feet, while his automobile was still at least thirty (30) feet from the main line, even traveling on a straight line, rather than on an angle, and a passenger train was

coming at a rapid rate of speed, approaching the crossing at a terrific speed, within full view of the driver of the automobile, if he looked in the direction of the train whether in the opinion of the witness the driver of the automobile under those circumstances would be exercising care and caution, alertness or especial ability to drive and handle his automobile, if he continued to go over the crossing at the rate of six miles an hour, without stopping or turning aside.

(b) In restricting the cross-examination of the witness, Bessie Weythman, by refusing to allow counsel for the defendant to cross-examine said witness, after said witness had testified to the effect that Cecil Slocomb was a careful and prudent driver of an automobile, whether if she were riding in an automobile with another person driving, and there were three people in a one-seated roadster, and she came to a point where the road crossed three railroad tracks, and there were boxcars and warehouses on each side of the highway at the crossing, and after the driver of [41] the automobile was clear of those obstructions at the crossing he had a clear view of the track for at least 1000 feet, while his automobile was at least thirty (30) feet from the main line, even traveling on a straight line, rather than on an angle, and a passenger train was coming at a rapid rate of speed, approaching the crossing at a terrific speed, within full view of the driver of the automobile, if he looked in the direction of the train, whether in the opinion of the witness the driver of the automobile, under those cir-

cumstances, would be exercising care and caution, alertness or especial ability to drive and handle his automobile, if he continued to go over the crossing at the rate of six miles an hour, without stopping or turning aside, and in restricting the cross-examination of said witness by sustaining an objection to the question, after the witness had testified to the effect that in her opinion Cecil Slocomb was a careful and prudent automobile driver,—"Do you think a person who is driving an automobile across a railroad crossing at such a slow rate of speed that he can stop practically instantaneously and he has a clear view up the railroad track, in the direction of an approaching train, for at least 1,000 feet, when his automobile is within thirty (30) feet of the track on which the train is approaching, is exercising care, caution or alertness, or special ability to drive and handle his automobile, if he fails to stop his machine, or turn it aside, before it reaches the track on which the train is approaching, and before the train reaches the crossing?"

(c) The admission of the testimony of the witness, [42] Al Aldred, as to the distance within which a train, traveling at sixty (60) miles an hour, could be stopped in after the application of the air, upon the ground that the witness was not shown competent and qualified to testify upon this subject, under the facts as they existed in the case. It was not shown that he had ever operated a train equipped with New York air brakes, or in the instant case what the train line pressure was, what the air pressure was, what the condition of the

brakes on the train was at the time, how much braking power the train had, the weight of the train was not shown, nor the grade on the railroad, or the condition of the rails, and various conditions that must necessarily be considered by the witness in determining the distance within which such a train can be stopped, were not in evidence and were not related to the witness in the hypothetical question.

(d) The admission of the testimony of the witness, C. J. Judkins, as to the distance within which a train, traveling at sixty (60) miles an hour, could be stopped in after the application of the air, upon the ground that the witness was not shown competent and qualified to testify upon this subject, under the facts as they existed in the case. It was not shown that he had ever operated a train equipped with New York air-brakes, or in the instant case what the train line pressure was, what the air pressure was, what the condition of the brakes on the train was at the time, how much braking power the train had, the weight of the train was not shown, or the grade on the railroad, or the condition of the rails, and various conditions that must necessarily be [43] considered by the witness in determining the distance within which such a train can be stopped, were not in evidence and were not related to the witness in the hypothetical question.

(e) The admission of the testimony of the witness, Al Aldred, as to how much time would have been saved in the train reaching the railroad crossing, and to what speed the train would have been

brought down to, assuming it was traveling at 60 miles an hour at the time the emergency brake was applied, if the emergency-brake on the train had been applied while the train was traveling 60 miles an hour when the train was 300 feet from the crossing, upon the ground that said testimony was incompetent, irrelevant and immaterial, as an engineer of a train does not have to apply the brakes the moment a person is seen approaching a railroad crossing. The law is that he has a right to rely upon the assumption that the driver will use due care and give the train the right of way, and until he sees that the automobile driver is not going to do so, and is going to drive into danger, the engineer of the train is under no obligation to apply his brakes, upon the ground that there was no evidence in the case upon which to base a reliance on the last clear chance rule, and the testimony elicited from the witness was wholly immaterial and not within the issues.

(f) The admission of the testimony of the witness, Al Aldred, as to the distance within which defendant's train, going thirty-five miles an hour, should have been stopped, upon the ground that the witness was not shown qualified or competent as an expert on the subject of air, [44] and the facts in the instant cases were not sufficiently stated to him to enable him to testify as an expert on the subject.

(g) The admission of the testimony of the witness, Al Aldred, as to the speed at which the defendant's train must have been going at the time of the

collision, upon the ground that the witness was not shown qualified or competent to testify upon the subject, or sufficiently familiar or competent in the operation of air-brakes, to enable him to testify upon the subject, and that the facts were not sufficiently stated to him to enable him to give a correct and accurate answer.

(h) The admission of the testimony of the witness, C. J. Judkins, as to the speed at which defendant's train must have been running at the time of the collision, upon the ground that the witness was not shown qualified or competent as an expert to testify upon the subject, or sufficiently familiar with the operation of air-brakes to enable him to reach an intelligent conclusion, to entitle him to testify as an expert, and that the facts in the instant case were not sufficiently related to him to give an accurate and correct basis and foundation for the witness' answer.

(i) Admission of the testimony of the witness, C. J. Judkins, as to the amount of time which could have been saved, assuming the train was running 60 miles an hour, if the emergency had been applied when the train was 300 feet west of the crossing, upon the ground that the witness was not shown as sufficiently qualified or competent or familiar with air-brakes, to enable him to [45] testify upon the subject; that the facts of the instant case were not sufficiently related to him, and that at best his answer would be purely speculative, and that the information sought to be obtained by the question put to the witness was wholly irrelevant and imma-

terial and not within the issues, since the last clear chance rule was not in the case.

II.

The denial by the Court of defendant's challenge to the sufficiency of the evidence and of defendant's motion for a directed verdict in his favor at the close of the testimony.

III.

The giving and refusing of instructions to the jury, as follows:

(a) The instructing of the jury by the Court to the effect that under the laws of this state it was the duty of the defendant in this case to ring the bell or sound the whistle upon the locomotive at least 80 rods from the place where the defendant's railroad crosses the public highway in the Town of Monitor, and also to continue such ringing of the bell or sounding of the whistle, until such locomotive shall have passed the crossing.

(b) The instructing of the jury by the Court to the effect that the train had the preference right of way, but it is bound to give due warning of its approach, so that the automobile may stop and allow it to pass, and to use very exertion to stop, if the automobile is unavoidably in the way.

(c) The instructing of the jury by the Court to [46] the effect that if the deceased, Wilson M. Slocomb, was guilty of contributory negligence, and he had no control over the driver of the car, and the driver of the car was in no way responsible to him, and the car did not belong to the deceased, and the collision was the result of concurring negligence

of both the railroad company, in the operation of the train, and the driver of the automobile, over whom the deceased had no control, and in a car in which he had no interest and exercised no control, the plaintiff would be entitled to recover.

(d) The instructing of the jury by the Court to the effect that whether the deceased, Wilson M. Slocomb, was the owner of the automobile, was one of the facts for the jury to try.

(e) The instructing of the jury by the Court to the effect that it was for the jury to determine whether the driver of the automobile was a person for whose negligence the deceased was responsible.

(f) Failure of the Court to give defendant's requested Instruction No. 1, reading as follows:

> "The jury is instructed to return a verdict for the defendant."

(g) Failure of the Court to give that part of defendant's requested Instruction No. 3, reading as follows:

> "It is not the law in the State of Washington that at every road or street crossing in a village or city a railroad company is bound to place a watchman, or to install gates or gongs, or any other device for the safety of persons crossing the tracks at said point. The law in force at the time of this accident placed upon the Public Service Commission of this state the duty of determining the safety of railroad crossings and the necessity of maintaining a watchman and of installing gates or gongs or any other device upon particular crossings.

Under this [47] law the mayor or city council or other governing body of any city or town, or the county Commissioners of any county within which any highway is crossed by any railroad, may petition the Public Service Commission for a change in the crossing to more adequately protect travelers on the highway, and the Commission may order any change that it may deem advisable."

(h) Failure of the Court to give that part of defendant's requested Instruction No. 11, reading as follows:

"Should you believe from the evidence that the deceased knew, or by the use of reasonable diligence might have known of the approach of defendant's train, and thereby have avoided danger, then you will find for defendant."

(i) Failure of the Court to give defendant's requested Instruction No. 12, reading as follows:

"Even though the jury believe the train was running at a fast rate of speed, and that no bell was rung or other signal given of the approach of the train to the crossing, and that such conduct on defendant's part was negligence, still this or any other negligence of the defendant did not excuse the deceased from using proper care for his own safety. He should have listened and looked all the time until he reached the crossing, and if his failure to do either was the cause of his injury, then he was guilty of contributory negligence, and your verdict must be for the defendant."

(j) Failure of the Court to give that part of defendant's requested Instruction No. 13, reading as follows:

"You are instructed that the deceased, Wilson M. Slocomb was the owner of the automobile, and that it is wholly immaterial, so far as this case is concerned, by whom the automobile was driven at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should consider the deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving."

(k) Failure of the Court to give defendant's requested Instruction No. 13a, reading as follows:

"You are instructed that it is conclusively presumed that the deceased, Wilson M. Slocomb, was the owner of the automobile. You need not concern yourselves with the question as to who was driving the automobile at the time of the accident, except, if you believe it was driven by the son Cecil, then [48] you are instructed that you should consider deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving. The deceased was an occupant of the automobile, and whether it was driven by him or by some other person, he is answerable for the negligence of the driver.

If you find in this case that the driver of the automobile, no matter by whom it was driven, was negligent, and that his negligence contrib-

uted in any degree as a proximate cause to the collision, then I charge you that plaintiff is not entitled to recover, and your verdict should be for the defendant."

(l) Failure of the Court to give defendant's requested instruction No. 13b, reading as follows:

"You are instructed that an automobile is personal property, and that the law presumes that personal property in the possession of a mature man is his own, and the burden of proving that this automobile was the property of the son, Cecil Slocomb, is on the plaintiff.

In this connection you are instructed that the laws of the State of Washington provide that an application for a motor vehicle must show the name of the owner of the automobile, with the business or residence address thereof, or both, if there be such, and that such application shall be made to the County Auditor by the owner of the vehicle, or his duly authorized agent, over the signature of such owner or agent, and that he shall certify on oath that statements therein are true to the best of his knowledge. The law also provides that no license shall be transferred from one person to another person, and if there is a transfer of the title to an automobile, before the new owner is entitled to operate it he must take out a new license."

(m) Failure of the Court to give that part of defendant's requested instruction No. 14, reading as follows:

"If you believe from the evidence that the son Cecil was driving the car, and that he was guilty of negligence which contributed in any degree as a proximate cause of the collision, or that the deceased, Wilson M. Slocomb, was guilty of negligence, either as driver of the car or as a passenger, while his son Cecil or Glen Long was driving the car, which in any degree contributed as a proximate cause to the collision, then I charge you the plaintiff [49] cannot recover, and your verdict should be for the defendant."

(n) Failure of the Court to give defendant's requested instruction No. 14a, reading as follows:

"You are instructed if you believe from the evidence that the presence of three men in the roadster at the time of the collision contributed to the accident as one of the proximate causes, then the plaintiff cannot recover, and your verdict should be for the defendant."

(o) Failure of the Court to give that part of defendant's requested instruction No. 15, reading as follows:

"In this connection, if you believe from this evidence that the deceased's minor son Cecil was driving the automobile at the time of the collision, and that his father was a passenger, then you should consider the relation of father and son and the opportunity and duty of the father to guide and control the acts of his minor son. If you find from the evidence that the conditions just stated existed, and that un-

der them deceased made no effort to look out for danger or protect himself against it, and in consequence the automobile collided with the train, whereby the deceased was killed, then I charge you that deceased was guilty of negligence which contributed to his own injury, and the plaintiff is not entitled to recover damages therefor."

(p) Failure of the Court to give defendant's requested instruction No. 16, reading as follows:

"Even though you should find from the evidence that the speed of the train was excessive, or that the engineer failed to give a warning of its approach, if such were the fact, it did not relieve the deceased, or the driver of the automobile, if a person other than the deceased, from the necessity of taking ordinary precautions for his safety. Negligence of defendant in these particulars would be no excuse for negligence on the part of the occupants of the automobile. A motorist is bound to listen and to look before attempting to cross a railroad track, and not to drive carelessly into a place of possible danger, but to have his automobile under control, and to stop, if necessary. If by using his senses of sight and hearing, deceased or some one for whose negligence deceased is answerable, could have seen or heard the train in time to avoid a collision, but either failed to make use of his senses and drove thoughtlessly upon the track, or saw the train and [50] attempted to beat it across the

crossing, or did not see the train, but could have seen it if he had looked and could have stopped and avoided the collision, then deceased was guilty of negligence contributing to his death, so as to deprive plaintiff of her right to recover."

(q) Failure of the Court to give defendant's requested Instruction No. 19, reading as follows:

"The duty of a person to look and listen before crossing a railroad, includes the duty to do that which makes looking and listening reasonably effective. If there is a permanent obstacle that obscures the view of an approaching train until the traveler on the highway is within a few feet of the railroad, it is the duty of the traveler on the highway to look and listen after he has passed the permanent obstacle, and just before going upon the tracks.

You are instructed that if this automobile was driven toward the crossing at such a rate of speed that the driver was unable to check and stop it in time to escape a collision with a passing train, after arriving at a point where the occupants of the automobile must have seen the approaching train, if they had looked, and where a collision could have been avoided, then deceased was guilty of contributory negligence and your verdict must be for the defendant."

(r) Failure of the Court to give defendant's requested Instruction No. 20, reading as follows:

"You are instructed if, after passing the boxcars standing on the industry track, the ap-

proaching train was in full view of the occupants of the automobile, if they looked in that direction, and, if you further find at that time the automobile was traveling at a rate of speed which would have enabled the driver of the automobile to stop or turn aside and avoid a collision with the train, if he had looked in the direction of the train and seen it approaching, or if you find that the occupants of the automobile obtained or could obtain their first view of the approaching train immediately after passing the boxcars standing on the industry track, and that at that time the driver of said automobile did not have his machine under control, so that he could stop or turn aside and avoid a collision if a train was approaching, then, and in that event, the driver of the automobile was guilty of negligence and deceased, Wilson M. Slocomb, as the owner of the automobile, was responsible for such negligence, and if you so find, your verdict should be for the defendant." [51]

(s) Failure of the Court to give defendant's requested Instruction No. 21, reading as follows:

"You are instructed if, after passing the boxcars standing on the industry track, the approaching train was in full view of the occupants of the automobile, if they looked in that direction, and if you further find at that time the automobile was traveling at a rate of speed which would have enabled the driver of the automobile to stop or turn aside, and avoid a collision with the train, if he had looked in the

direction of the train and seen it approaching, then in that event the driver of the automobile was guilty of negligence, and deceased, Wilson M. Slocomb, as the owner of the automobile, was responsible for the said negligence of the driver, and, if you so find, your verdict should be for the defendant."

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

Edwin C. Matthias, being first duly sworn, on oath deposes and says he is one of the attorneys for the defendant herein; he has caused the foregoing and within petition for new trial to be prepared, knows the contents and purpose thereof and believes the same to be meritorious and well founded in law, and states that the same is not interposed for the purpose of delay.

EDWIN C. MATTHIAS.

Subscribed and sworn to before me this 14th day of July, 1922.

[Seal] THOMAS BALMER,
Notary Public in and for the State of Washington,
Residing at Seattle. [52]

We hereby acknowledge service of the foregoing petition for new trial and the receipt of a true copy thereof, this 15 day of July, 1922.

WM. MARTIN,
By H. A. M.,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 15, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [53]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America, Under the Transportation Act of 1920,

Defendant.

Order Denying Petition for New Trial.

This matter coming regularly on before the Court on defendant's motion for a new trial, and the Court having heard the argument of counsel and being duly advised in the premises,—

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion for new trial be, and the same is hereby denied, to which the defendant excepts and the exception is by the Court allowed.

Done in open court this 26th day of July, 1922.

EDWARD E. CUSHMAN,
Judge.

O. K.—WM. MARTIN.

We hereby acknowledge service of the foregoing order and the receipt of a true copy thereof, this 22d day of July, 1922.

WM. MARTIN.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [54]

(Copy)

In the United States District Court for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Defendant.

Judgment.

This cause came on duly and regularly for hearing and trial before the Honorable Edward E. Cushman, Judge, on the 16th day of May, 1922, sitting with a jury duly and regularly empanelled to try said cause, and the trial thereof concluded on the 24th day of May, *1924.* Evidence was introduced on behalf of the plaintiff and on behalf of the defendant, after which the case was argued to the jury by Wm. Martin, Esq., attorney for plaintiff, and E. C. Matthias, Esq., attorney for defendant. The Court thereupon instructed the jury and the jury retired to consider its verdict, and thereafter, on the 24th day of May, 1922, returned its verdict into court duly signed by its foreman, wherein the jury found in favor of the plaintiff, Marion C. Slocomb, and against the defendant, James Cox Davis as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, in the sum of $13,-750.00, which said verdict was duly filed and entered as the verdict of the jury in said cause and court.

IT IS THEREFORE, on motion of Wm. Martin, Esq., [55] ORDERED that judgment be entered in accordance therewith.

WHEREFORE, it is hereby ORDERED, CONSIDERED AND DECREED that the plaintiff, Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, deceased, do have and recover of and from the defendant, James Cox Davis as the Agent of the United States Government, so desig-

nated by the President of the United States under and in pursuance of the Transportation Act of 1920, the sum of thirteen thousand seven hundred and fifty dollars ($13,750.00), together with her costs and disbursements herein taxed at the sum of $500.50, together with interest thereon from the 24th day of May, 1922, at the rate of 6% per annum until paid, and that said judgment, costs and interest be paid forthwith from funds appropriated as provided in said Transportation Act of 1920 or any Acts of Congress amendatory thereof or supplementary thereto, for the payment of claims arising against the United States government and the Director General while running and operating the railroads during governmental control.

Done in open court this 5th day of June, 1922.

E. E. CUSHMAN,
Judge.

Copy received this 5th day of June, 1922.

E. C. MATTHIAS.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 5, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [56]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Defendant.

Motion for Extension of Time Within Which to Serve and File Bill of Exceptions.

Comes now the defendant above named, within ten days after the rendition of the verdict here, and moves the Court for an extension of time within which to serve upon the plaintiff herein, and to file in this court his proposed bill of exceptions herein, to and including the first day of September, 1922.

This motion is based upon the files and records herein, and upon the affidavit of Edwin C. Matthias, attached hereto, and hereby made a part hereof.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant. [57]

State of Washington,
County of King,—ss.

Edwin C. Matthias, being first duly sworn, on oath deposes and says: He is attorney for defendant herein. Affiant will be engaged in the trial of cases in the State and Federal Courts until after the middle of July. The Slocomb case consumed five days of trial, and affiant is informed and believes that the stenographic record covers between seven hundred and eight hundred pages of typewritten matter. It will require considerable time to reduce the stenographic matter to a concise and accurate bill of exceptions, and it is necessary that affiant have until September first within which to prepare said bill of exceptions.

EDWIN C. MATTHIAS.

Subscribed and sworn to before me this 27th day of May, 1922.

[Seal] THOMAS BALMER,
Notary Public in and for King County, Residing at Seattle, Washington.

We hereby acknowledge service of the foregoing motion for extension of time within which to serve and file bill of exceptions and the receipt of a true copy thereof, this 27th day of May, 1922.

WM. MARTIN,
Attorney for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [58]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Order Granting Defendant Extension of Time Within Which to Prepare, File and Serve Bill of Exceptions and Within Which to Have Bill of Exceptions Signed and Settled.

This matter coming on regularly for hearing before the Court within ten days after the rendition of the verdict herein, on defendant's motion for an extension of time within which to prepare, serve and file its bill of exceptions herein, and the Court having considered the motion, and heard counsel on both sides, and being duly advised in the premises.

IT IS HEREBY ORDERED that the defendant is hereby granted an extension of time to and including the 1st day of September, 1922, within which to have reduced to writing, served on the

plaintiff and filed herein, defendant's bill of exceptions herein.

Done in open court this 29th day of May, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [59]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as the Agent Designated by the President of the United Sates Under and in Pursuance of the Transportation Act of 1920,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED, That on the 23d day of May 1922, at the hour of ten o'clock A. M., the above-entitled cause came on for trial in the above-named court before the Honorable E. E. Cushman,

Judge, sitting with a jury duly impaneled and sworn. The plaintiff appeared in person and was represented by her attorney, William Martin, Esq., and the defendant appeared and was represented by his attorney, Edwin C. Matthias, Esq.

Statement of the case was made to the jury by Mr. Martin.

Testimony of Kenneth F. Roahen, for Plaintiff.

KENNETH F. ROAHEN, being called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

Direct Examination by Mr. MARTIN.

My name is Kenneth F. Roahen. I live at Wenatchee, Washington, and am engaged in photography work. I took a number of photographs of the railroad crossing at Monitor, including Plaintiff's Exhibits Numbered 1 to 14, inclusive. Exhibit No. 1 shows the semaphores in the foreground, and the Slocomb residence. The semaphores are located about a quarter of a mile up the track west of Monitor. Exhibit 2 shows the whistling-post for the Monitor crossing. Exhibit 3 shows the Monitor crossing taken from the west looking east. Exhibit 4 shows the Monitor crossing taken from the west looking east. Exhibit 5 is also a picture of the Monitor crossing looking in an easterly [60] direction. Exhibit 6 was taken a little below the crossing looking sideways at it. Exhibit 7 was taken from the front porch of the Slocomb residence, looking up the tracks. Exhibit 8 was taken from the front yard of the Slocomb residence, looking in

(Testimony of Kenneth F. Roahen.)

a westerly direction up the track. Exhibit 9 was taken from practically the same place as 8. Exhibit 10 shows the Monitor crossing looking southeasterly. Exhibit 11 was taken from the front porch of the Slocomb residence with the afternoon Limited train coming east. Exhibit 12 was taken from the same place on the front porch showing the train coming in view in front of the house. Exhibit 13 was taken from the Monitor depot looking crossways up the track toward the west. Exhibit 14 was taken in Monitor from in front of the restaurant looking up the track.

Cross-examination by Mr. MATTHIAS.

Plaintiff's Exhibits 1 to 10, inclusive were taken in the month of January, 1922. In order to get the pictures which show the boxcars the boxcars were moved into the position shown in the pictures with a tractor owned by Mr. Simonson, Mrs. Slocomb's brother-in-law. Mr. Simonson and a hired man of the Slocomb's pulled the boxcars up into position with the tractor. I was not on the scene of the accident at the time it occurred and do not know whether the pictures correctly portray the conditions as they existed at that time. Plaintiff's Exhibits 11 to 13, inclusive, were taken the Friday and Saturday before the trial.

Whereupon the testimony of the witness was closed and P. H. PRITCHETT was produced as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of P. H. Pritchett, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is P. H. Pritchett. I was in Monitor on November 27th, 1919, and saw this accident. I was working across from the depot at Monitor unloading lumber for the Columbia Valley [61] Lumber Company.

Plaintiff's Exhibit 1 admitted.

Plaintiff's Exhibit 2 shows the semaphores in front of Mr. Slocomb's house, and also shows the big curve in the track where the train is out of sight there, and the whistling post for the crossing. Plaintiff's Exhibit 3 does not show the crossing just as it was on the day of the accident, as there is a danger signal in the picture that was not there at that time. The crossing has been rebuilt, so that it runs closer to the station now than it did at the time of the accident. It used to run up close to the warehouse and circle out, and you had to go up there and circle back, but you don't have to do that now.

Plaintiff's Exhibit 3 admitted in evidence.

Plaintiff's Exhibit 4 also shows a danger signal that was not there at the time of the accident. The road used to cross farther west from the depot than it does in the picture. The truck body shown in this picture was not there at the time of the accident. The crossing is in better condition than it was at the time of the accident.

Plaintiff's Exhibit 4 admitted in evidence.

Plaintiff's Exhibit 5 shows the condition as it

(Testimony of P. H. Pritchett.)

existed at the time of the accident as near as I can remember, with the exception that the road swung out and there was a better opportunity to get a view. At the time of this accident there were cars spotted in similar position to that shown in the photograph. I couldn't swear exactly that they were in that position, but I know when I was hauling lumber I had to go up with my truck on the other side of the track and come up against the end of the car standing here, and back up, and go ahead again, in order to get around with my load of lumber. As to the measurement of the distance between the cars I could not swear to that. I think the cars that were standing there were refrigerator cars. As near [62] as I can remember without measurements the photograph is very near correct.

Cross-examination by Mr. MATTHIAS.

The reason I had to back was that the cars were too near together, but I did not measure the distance between the cars nor the location of the cars with respect to the crossing planks. The only thing I have to go by to tell the location of the cars is by the telephone pole. I remember the door of the car was standing in front of the telephone pole on that day by the Wenatchee Northern warehouse. I noticed the door because they were unloading some stuff there. The bulkheads shown in the picture are farther away from the car than it looks. There were some bulkheads there at the time of the accident, but I don't know whether those shown in the picture were there, and I don't know how far out

(Testimony of P. H. Pritchett.)

on the road they extended. I cannot tell how far this car on the right-hand side of the picture stands in the picture over the crossing planks as the crossing planks were laid on the day of the accident. The car on the west was the one that extended over the crossing planks, the one on the east did not. I did not take any measurements and cannot tell how far the one on the west extended over the crossing planks.

Plaintiff's Exhibit 5 admitted.

Redirect Examination by Mr. MARTIN.

Plaintiff's Exhibit 6 shows the crossing taken from the east side looking across to the north from the south side. The cars on the day of the accident were standing similar to those shown in the photographs.

Recross-examination by Mr. MATTHIAS.

From this photograph I can tell that the car on the left here is the one that covers about half of the crossing as the crossing was at the time of the accident, and the car on the right cleared the end of the crossing planks. [63]

Plaintiff's Exhibit 6 admitted.

Redirect Examination by Mr. MARTIN.

Plaintiff's Exhibit 10 shows the crossing at Monitor from the west looking toward the depot. The point where the man is standing is about where the old crossing was located at the time of the accident. The new crossing as shown in the photograph was

(Testimony of P. H. Pritchett.)

put in after the accident. The building is the Monitor depot.

Plaintiff's Exhibit 10 admitted.

At the time of the accident I was working directly across from the depot. This picture does not show it. I was unloading lumber from the third boxcar east of the crossing. While I was unloading I heard a train whistle. It sounded like it was quite a ways down and I could only barely distinguish the whistle. I couldn't swear for sure the train ever whistled there, but I imagine I heard a train whistle, so I give them that much credit that I heard them whistle. The train was late on this particular day. I finally saw the train coming quite a ways down the track. Right at this particular crossing there is a straight line of track which runs out to the semaphore and you could see quite a little distance if you were looking. When I first saw the train it was coasting. When it passed the semaphore I saw the smoke raise again where he struck that straight line of track. I never heard him whistle for any crossing at all. The only whistles that he gave were three whistles—two short and one long whistle, just as he struck the car. It seemed to me that the third whistle was given just as the engineer was getting his head back in. The third blast was longer than the first two. The back end of the automobile was just cut off. I didn't know who the occupants of the automobile were then. The tip of the automobile raised up into the air and the engine passed it before I could take a second

(Testimony of P. H. Pritchett.)

look and the train rumbled by, and I ran [64] across to where the occupants of the car were laying up by the operator's window at the depot all in one bunch, wrapped up in the top and part of the automobile. Referring to Plaintiff's Exhibit 10, the automobile was lying within a few feet of where the truck body can be seen in the photograph, and the bodies were lying on the platform next to the little operator's window.

I noticed the automobile going across the passing track. The train was quite a little ways up the track when the automobile was on the passing track, but I don't know just what distance it was. It was coming awfully fast and I could not judge the distance of it at all. The train was coming very fast. It was coming directly toward me and the only thing I could judge would be the amount of time it took the train to make the distance; that would only be a matter of judgment. It didn't seem to me the engineer made any attempt to stop the train until about the time it struck the auto. The train didn't slow down until the engine got even with me. I could hear the exhaust as the engineer applied the brake as he hit the car. I heard this exhaust when the engine was about fifty feet from the car. The automobile was moving about six miles an hour when it was struck by the train. At the time the automobile was struck its left hind wheel was just inside the track and the right hind wheel was just a little farther back and it struck on the hub of the left hind wheel and it knocked a piece

(Testimony of P. H. Pritchett.)

out of the pilot with the left hind wheel of the car. The pilot struck the left hind wheel of the automobile as the train was going east. The left hind wheel was just inside the north rail of the main line track at the time it was struck. At the time the automobile was struck it was proceeding ahead at about the same rate of speed it had been making. The crossing was in poor condition—the crossing planks were broken and some of them were gone. The crossing [65] planks were in worse condition at this time than they were before. A few days before the accident there had been a drawbar broken out of a car and it broke some of the planks at the time and some of the planks were out. The highway between the tracks was pretty rough. There were holes in it that they had been filling up. I had driven across the crossing several times a day. I had to go very slow, especially if I had a load on. I could hardly get over there at all if I had my truck overloaded. The extreme condition of this crossing had lasted only a few days but during my stay at Monitor it was never much better than this. Looking at Plaintiff's Exhibit 10, I think the right hind wheel of the automobile was within a foot or so of where this man is standing at the time it was struck. The bodies were picked up down by the little operator's window at the depot. Sometimes the crossing was even in worse condition with reference to the cars that were spotted there. I know there were times when two cars could not pass on the public highway there at all, on account of the manner in

(Testimony of P. H. Pritchett.)

which the boxcars were spotted. This had been the condition there for the year I was in Monitor. The crossing is used an awful lot. I have sat there and counted fifteen cars crossing in a minute and a half. It is a very busy district in the apple season. This was the only highway between Cashmere and Wenatchee at the time. I hardly ever noticed the train whistle for the crossing at all. About the only noise you would hear would be their station whistle and they would go right through. Once in a great while they would blow for the crossing but very seldom. The river would make it almost impossible for a person to hear a train if they were coasting in. You could not hear a train above the roar of the river without it whistled unless you were standing very close to it. The bodies were loaded on the baggage car and taken to Wenatchee. [66]

Cross-examination by Mr. MATTHIAS.

I was unloading lumber from the car on to my truck which stood by the door of the freight-car west of the crossing on the industry track, which was just about opposite the Monitor station, when I heard the train whistle for the first time. It was the whistle of the train that attracted my attention. I then looked up, but didn't see the train when I first looked up. I looked up again when I saw the front wheels of the automobile coming across the industry track. At that time the train was quite a ways down. The main track was the track fartherest to the north, the industry track was the track fartherest to the south and the passing track

(Testimony of P. H. Pritchett.)

was in between these two. Between the industrial track and the passing track there was a road used by teams and trucks, in loading and unloading cars. The boxcar on the industrial track to the west of the crossing stood five or ten feet to the west from the main traveled part of the crossing at the time of the accident. The boxcar on the industrial track on the east side of the crossing cleared the crossing, so that the cars on both sides cleared the wagon road used by the public as a highway, but not the planking. After I saw the front wheels of the automobile come across the industrial track I watched the automobile all the time. It was going about six miles an hour. I first thought of the speed when I saw the car coming, because I was wondering if it was going to get across the track and out of the way of the train. It was a Chevrolet roadster,—a small car. After the accident I discovered that three men had occupied it at the time of the accident, Mr. Slocomb senior, a man that weighed probably 130 or 140 pounds, Cecil Slocomb, sixteen or seventeen years old, about the same weight as his father, and Glen Long. As I watched the automobile going six miles an hour it proceeded on its way as though it was going right directly across. It did not decrease nor increase its [67] speed that I could tell. It was going about six miles an hour when it was hit. The curtains were down on the automobile on the side next to me. I didn't see the automobile give any signs of stopping or attempting to stop, or see the effect of the ap-

(Testimony of P. H. Pritchett.)

plication of the brakes on either wheel, or any attempt to turn the wheels of the automobile down between the passing and industry tracks, or the passing and main line tracks.

The whistle I first heard was one blast. When I looked up I did not see the automobile. I went on with my work. When I looked up again the automobile was coming across the industry track. The reason I did not go on working was that I was wondering whether the automobile was going to get across the track ahead of the train. The train was up by the semaphores when I first saw it. It was there when the automobile was coming into view on the industry track. I saw the train and the automobile about the same time. The automobile first attracted my attention, although there was nothing unusual about it, I was wondering whether it would make it across. I also wondered whether it would stop before it got to the main line. I was wondering what it was going to do. I thought if they saw the train they would stop. I don't believe they saw it. If their automobile was in good mechanical condition, going at the rate of speed they were going, they could have stopped if they had seen the condition they were in; that is, they could have stopped between the time I first saw them and the time they reached the main line. You could drive an automobile across that crossing five or six miles an hour and turn the car down in between the passing and industry tracks. When I heard the exhaust indicating the application of the

(Testimony of P. H. Pritchett.)

brakes on the train the engine was about fifty feet from the automobile. Monitor is a very small point. There is only just a store and postoffice and a few warehouses. The people that live around there live on fruit ranches. The Slocombs lived up [68] on the hill just above the railroad track and about even with the semaphores, perhaps a little west of the semaphores. It was customary for people who operated the warehouses on the industry track and people who were loading and unloading cars, to move the cars which were spotted on the industry track from the place where they had been spotted by the railroad, and to do this they used pinch bars. Sometimes they moved the cars a good many feet that way. I have seen it done right along.

Redirect Examination by Mr. MARTIN.

The automobile was a new Chevrolet roadster. It had been purchased sometime that summer. As soon as the automobile came over from behind the cars standing on the industry track the driver could have gotten a view up the track in the direction from which the train was coming. I did not hear the bell of the locomotive ringing.

Recross-examination by Mr. MATTHIAS.

When I heard the train whistle it was around the curve west of the semaphores. When I heard the second whistle it was east of the semaphores just before it struck the cars.

Whereupon the testimony of the witness was closed, and W. E. LONG was produced as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of W. E. Long, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is W. E. Long. I resided in Monitor at the time Mr. Slocomb was killed November 27th, 1919. Plaintiff's Exhibit 9 is a photograph taken from in front of Mr. Slocomb's house, looking west up the track. I have marked an "X" on the photograph about where the house was located in which I was living at the time. On this day I was at the house waiting for the train to come through and bring the mail. My attention was first attracted to the train by the whistle. I heard the whistle just [69] above the crossing west of Monitor, about three-eighths of a mile west of our house. When we heard the whistle we started for Monitor.

Exhibit 9 admitted in evidence.

It was about 125 feet from our house to the track. We were about five feet from the right of way fence when the train passed our place. The train was going about 60 or 65 miles an hour. It was in view until it got around the curve going east toward Monitor. I mean the curve shown in Plaintiff's Exhibit 2, the curve at the semaphore. The semaphores are about a quarter of a mile from Monitor. I did not hear the train whistle at or near the semaphores. We were about up on the track when

(Testimony of W. E. Long.)

the train went around the curve. We started down the track toward the postoffice after the mail. The next thing we knew we heard two short and one long blast of the whistle. We couldn't see the train at that time. We started running, as the whistle sounded like danger signals. That is the reason we hurried. We didn't hear any other whistles, although we were in a position to have heard them if whistles were blown. I did not hear the bell ringing, although I was in a position to hear the bell if it rang. We followed the train down to Monitor. The train was just pulling out when we got to the crossing. The bodies had been loaded on and the train started away. I noticed the way the cars were spotted at the crossing at Monitor. They looked about the same as in Exhibits 5 and 6. I did not observe the distance between the cars nor measure it. It had been the custom of the railroad company to spot cars at this crossing similar to that shown in Exhibits 5 and 6. The crossing was not in very good condition, although I am not certain about the condition. The river made quite a bit of noise there. It would drown out the movement of a train up as far as the curve. I saw a blood spot on the west end of the Monitor depot in the corner under the operator's window. [70]

Cross-examination by Mr. MATTHIAS.

There are lots of riffles in the river at Monitor. The river does not take any perceptible drop that is visible to the naked eye. At Monitor crossing, the river is about a quarter of a mile from the rail-

(Testimony of W. E. Long.)

road track. The riffles in the river a quarter of a mile away from the crossing would drown out the roar of a train as it came around the curve in front of the Slocomb house. There isn't any curve from the time the track comes into the straightaways in front of Mr. Slocomb's house until it gets past the crossing at Monitor. When the train went by I was about five feet outside the right of way fence. It is fifty feet from the right of way fence to the track.

Redirect Examination by Mr. MARTIN.

The bridge across the river is below Monitor to the west. The river as it comes down is much closer to the crossing at Monitor than the bridge which crosses the river.

Whereupon the testimony of the witness was closed, and A. L. LONG was produced as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of A. L. Long, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is A. L. Long. I was living at Monitor on November 27th, 1919. At three-thirty in the afternoon on that day I was in the shack in which I was living about half a mile west of Monitor, with my brother, who has just testified. I noticed Train 26 pass about three-thirty on that afternoon. I was in the shack when my attention was first attracted to the train and when the train passed opposite the

(Testimony of A. L. Long.)

shack. I saw the train before it got to the semaphore. I was about a quarter of a mile away from the train when I observed it. It looked to me as if it was going about 60 or 65 miles an hour. The next thing that attracted my attention was three short blasts of the whistle, just before the [71] train got to the crossing at Monitor. I then commenced to run. I saw the train pass the semaphores as shown in Plaintiff's Exhibit 2. I heard one whistle from the train, which was given when it was above the shack. The cross placed by my brother on Plaintiff's Exhibit 2 shows the location of our shack. When I got down to Monitor I noticed the cars spotted on the industry track near the public highway. They looked about the same as shown in Plaintiff's Exhibits 5 and 6. I have seen cars spotted in that position quite often before, covering a period of about six weeks. The crossing was in bad shape, and had been so ever since I had been there. The automobile was stove down by the depot and there was blood on the window-sill on the end of the depot. I heard no bell on the engine as it passed the semaphores, although I was in a position to hear it if it rang.

Cross-examination by Mr. MATTHIAS.

I observed the speed of the train just as I came out of the shack. I don't know why it wasn't going 50 miles an hour instead of 60, or 75 instead of 65. I have just given my idea of how fast it was going, from the fact that I have been on trains that have

(Testimony of Marion C. Slocomb.)
traveled pretty fast, and I imagine it was going about the same.

Whereupon the testimony of the witness was closed, and MARION C. SLOCOMB was produced as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of Marion C. Slocomb, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is Marion C. Slocomb. I am the widow of Wilson M. Slocomb, and the administratrix of his estate.

Certified copies of letters of administration admitted in evidence as Plaintiff's Exhibt No. 15.

At the time of his death Mr. Slocomb was forty-three years old. Mr. Slocomb had been an orchardist for eight years [72] residing at Monitor, Washington. He had always been in good health, was industrious and economical, and always busy about his ranch comprising eight and three-quarters acres, planted in fruit. Mr. Slocomb took care of the orchard and also worked the year 1919 for Sullivan & Greiner, for which he was paid by them about $200. He had the best qualifications as an orchardist. Since my husband died we have paid over $100 to the man running the ranch. My brother is running the ranch. He gets two-thirds of the returns and pays the expenses. The $100 I spoke of is paid to the man who helps my brother. I get one-third of the returns from the ranch. The day of the accident my husband and son worked nearly all morning around the ranch. About a

(Testimony of Marion C. Slocomb.)

quarter to three in the afternoon my husband went to town and mailed a letter and came back; then we had dinner. We sat down shortly before three. We heard a train whistle about three-fifteen or three-twenty and heard a train go by, but did not see it. Mr. Slocomb got up from the table. Cecil was going to Wenatchee and my husband said he would go along. Mr. Slocomb, my son and Glen Long got in the car. It was my son's car. My son Cecil backed the car out of the garage, then Long got in the car, and then my husband, and they were sitting in the car that way when they left the house. After they left the house I stayed outdoors. The next thing that attracted my attention after they had gone was the train from the west. I heard the whistle at the west crossing approximately a mile up from our place. I watched the train as it came down over that stretch of track toward our place. I had watched it many times and I watched it that day, especially, because it was coming at an unusual rate of speed. It usually comes through there at a fast rate of speed and this day it was going unusually fast. Subsequent to that day I timed the train going through there and on three or four occasions I found that it made more than 65 miles an hour. The day it killed Mr. [73] Slocomb it was going faster than on the days I timed it. The semaphores and whistling-post are about a quarter of a mile from the Monitor crossing. They are located just a little to the right of my home. That is the place the trains usually blow for the crossing,

(Testimony of Marion C. Slocomb.)

but they did not blow the whistle on the day Mr. Slocomb was killed. When the whistle is blown you can see the steam from it from my front lawn. Plaintiff's Exhibits 10 and 11 show the river that runs through Monitor.

Plaintiff's Exhibits 7 and 11 admitted in evidence.

Cross-examination by Mr. MATTHIAS.

The postoffice at Monitor was on the other side of the railroad track from our house. On the day of the accident a short time before it happened, Mr. Slocomb went to Monitor to mail a letter. He went on a motorcycle with Glen Long and in going to the postoffice he crossed over the railroad crossing where he was later killed, and came back over it. That was about twenty minutes to three in the afternoon. Shortly after they returned we ate dinner and got up from the dinner table at three-twenty. My husband and son and Glen Long got the car out immediately to go on this trip. The car was a one-seated Chevrolet roadster, 1919 model, purchased about August, 1919. The brakes on the car were in first-class condition in every way. It was equipped with new tires. The car had not been driven more than a couple of months in and around Monitor and to Wenatchee and back. It was my son's car. He used it to go to school. All three of the occupants of the car knew how to drive an automobile. My husband had been a railroad man for sixteen years. He had been dispatcher, agent and traveling auditor for the Halifax & Yarmouth, International, Dominion

(Testimony of Marion C. Slocomb.)

& Atlantic and the Canadian Northern Railroad. He was familiar with the operation of the block signal known as a semaphore, located in front of our house. My husband bought the automobile and paid for it. [73½] The only independent money of his own my son had was what we gave him when he went to school every Monday morning. My son did not pay my husband for the car. It was a present to the son. I am administrator of my husband's estate and signed the inventory, although I did not make it out. I meant to tell the truth in the inventory. I do not have any particular recollection of signing the petition for distribution in my husband's estate.

Exemplified copies of the inventory by the administratrix of the estate of Wilson M. Slocomb, deceased, the petition for distribution in that estate and the order of dismissal, admitted in evidence as Defendant's Exhibits "A," "B" and "C."

We knew the crossing was dangerous. In timing the train I didn't send anybody up the railroad track with a stop watch. I held the watch on it myself. I used a wrist watch belonging to Mrs. Simonson. It had two hands, a minute hand and an hour hand. When the train came in sight and blew the whistle around the curve I looked at my watch. I watched it until every car was out of sight and then looked at my watch again, and from this estimated its speed. I never measured the distance along the track. I first began to watch the train when it was coming directly toward me at what I

(Testimony of Marion C. Slocomb.)

thought was a mile away, and following this procedure I estimated the speed at 60 or 65 miles an hour. Glen Long was managing my husband's ranch during the apple season and my husband was working down in Sullivan & Griner's warehouse. Mr. Slocomb, Mr. Long and Cecil were all tall and thin. Glen Long was about six feet.

Whereupon the testimony of the witness was closed, and INEZ PETERSON was produced as a witness on behalf of plaintiff, and being first duly sworn, testified as follows:

Testimony of Inez Peterson, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is Inez Peterson. On November 27th, 1919, I [74] resided at Monitor. I was teaching in a school building located four or five hundred feet from the crossing. I lived in the house which I have marked with a number "1" on Plaintiff's Exhibit 4. I have placed a number "2" on the window of my room in that house, as shown by the photograph. The noise from the river varied according to the atmosphere at the time. It was sometimes similar to the noise from a passenger train, but I should say dissimilar on more occasions. The rattle of the train made a noise different from that of the river. The noise from the river was loud enough to be heard very plainly at the crossing at any time. There was a certain roar of the river that was present at all times.

(Testimony of Inez Peterson.)

While standing in my window I saw a wheel coming down the road. I went over to the depot and saw the three bodies and the wrecked car. The bodies were lying up against the depot. The automobile was lying in a position between the figures "4" and "5" on Plaintiff's Exhibit 4. One wheel was torn off of the automobile. Train number 26 always went at a terrific speed through Monitor. Very frequently it didn't whistle.

Cross-examination by Mr. MATTHIAS.

When the train went by sometimes I was teaching, sometimes having a study period, and sometimes working for myself. All of the time I was busy, and because I did not hear the whistle sometimes when the train went through I would say that it did not whistle.

Redirect Examination by Mr. MARTIN.

At that time this highway was the only good road from Wenatchee to Cashmere, and all traffic had to cross that crossing, and men had to cross it in order to get to the warehouses and the majority of children coming to and from school used the crossing. There was a rather continuous line of trucks and cars during the apple harvest season, as well as foot passengers. [75]

Recross-examination by Mr. MATTHIAS.

I have never listened to the roar of the river and the roar of the train at the same time.

Whereupon the testimony of the witness was closed and E. W. SIMONSON was produced as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of E. W. Simonson, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is E. W. Simonson. I am familiar with the crossing at Monitor, having lived near Monitor about ten years. I am a brother of Mrs. Slocomb. I made some of the measurements and prepared some of the data for the map marked Plaintiff's Exhibit No. 16. The distances given on the map are correct, and the map correctly shows the public highway crossing over the railroad at Monitor. Starting at the intersection of the highway and the railroad track with reference to the warehouses to the east of the highway, the first warehouse is that of the Wenatchee Produce Company. The first section is 100 feet by 84 feet. The second section is 99.77 feet. The next space was formerly the Dore Supply Company or Sullivan & Greiner's warehouse. It is 200 feet square. This warehouse has burned down since the accident. The next warehouse is that of the Haskell Packing Company, 85 feet long and about 65 feet wide. The next is an addition to the latter warehouse. It is about 100 feet long and about 70 feet wide. Beyond that is the wood and coal yard operated by the Columbia Valley Lumber Company. Beginning at the west end of the warehouses which

(Testimony of E. W. Simonson.)

stand to the west of the highway, where it intersects the railroad track, the first warehouse at the west end is in two sections; the first section approximately 100 feet and the second approximately [76] 108 feet in length. The next building going east is a little frame warehouse, known as the Wenatchee Northern Warehouse, which is 51 feet long and about 30 feet wide. Next we come to the concrete warehouse, known as the Wenatchee District Co-operative Association. It is about 120 feet long, built of concrete. Joined on to the latter building is a wood addition about 39 feet long, which extends out to and forms the western boundary of the main traveled highway. The white marks along on the map in front of the warehouses represent boxcars spotted along the industry track during the apple season, and at other times with lumber and produce. There were more cars on the industry track the day of the accident than are represented on this map. They are drawn here just to give a general idea of how the cars stood. There were about 20 or 30 cars on the industry track on the day of the accident. The cars as represented on this map was standing by the highway crossing, with relation to the main traveled highway, are taken from exact measurements made after the accident, and before the cars were moved. I reached the scene of the accident just as the train was pulling out after the accident happened, and I had to drive past the boxcars standing on the industry track to get to the scene of the accident.

(Testimony of E. W. Simonson.)

After going to the scene of the accident at this time, I returned to the house and notified my sister, Mrs. Slocomb, of what had happened, and then immediately came down and measured the cars and the position they were in with relation to the warehouse. The cars had not been moved in the meantime. This highway is 40 feet wide. Of course, you understand that in the winter-time the only road used is what is made by automobile or wagon traffic. The car on the [77] west side of the county road projected 34.5 feet beyond the end of the warehouse standing to the west of the road. The east end of the car was 9.83 feet from the middle of the two wheel tracks made by the travel in the county road. It was a forty foot boxcar. The car on the east side of the crossing did not project on to the traveled public road, although it did project on to the surveyed county road. Coming from Mr. Slocomb's house, as soon as you reach the warehouse extending fartherest west from the highway and railroad crossing; traveling on the road going from Mr. Slocomb's house toward the railroad crossing, you cannot see again up the railroad tracks to the west from the road until you get past the boxcar standing on the industry track just to the west of the highway. The distance between the industry track and passing track is 22.9 feet. between the passing track and the main track 10.32 feet. The distance from the point where the automobile was hit by the engine to the operator's window in the depot at Monitor is 99.6 feet. I did not

(Testimony of E. W. Simonson.)

see the train strike the automobile. The distance from the center of the main traveled road to the place where the bodies were found is 99.6 feet. There is a little rise of approximately 3 feet in the grade of the road as it approaches the railroad tracks. There is a mark on the map showing approximately where the rear end of the train stopped after the accident. In Plaintiff's Exhibit No. 14 the X indicates the position of the rear end of the train when it stopped after the accident, which is the same place marked on the blue-print. The photograph also shows the warehouse of the Wenatchee Produce Company and the X is below and a little to the east of the depot. This picture correctly shows the situation looking east, as it [78] was at the time of the accident, except that one of the buildings has been moved in since the accident. (Plaintiff's Exhibit 14 admitted in evidence.) The distance between the ends of the boxcars standing on the industry track by the highway at the time of the accident, one to the east of the highway and the other to the west, was approximately 32 feet. I was present when Plaintiff's Exhibit 9 was taken. That shows the train at the crossing west of Monitor. Plaintiff's Exhibit 8 shows a train just appearing in view at the second curve west of Monitor. This picture was taken from the front of Mrs. Slocomb's residence. I measured out a mile on the railroad track from the semaphore west, and timed train No. 26 while running over that mile. My time showed that it

(Testimony of E. W. Simonson.)

took No. 26 less than a minute and a quarter from the time she appeared in view to pass Mrs. Slocomb's residence. That is over a mile. I timed the train on four different occasions. She was going at a terrific rate of speed. I didn't figure out the speed, but I did hold the watch, and can give you the actual distance it traveled in a certain time. The distance was a mile, and she made the mile in less than a minute and a quarter. On the four occasions that I timed the train, on three of those she made it in less than a minute and a quarter, and on one occasion she made it in very close to a minute. The distance was a mile. I didn't see the train on the day of the accident. The whistling-post for the Monitor crossing is about a quarter of a mile west of Monitor. It doesn't show in the photograph, Plaintiff's Exhibit 2. The post shown there is not the whistling-post. The semaphores shown in that photograph are about 150 feet less than a quarter of a mile from the Monitor crossing. [79] I was present when Plaintiff's Exhibits 11 and 13 were taken. They correctly show the view to the west from the Monitor depot. (Plaintiff's Exhibit 13 admitted in evidence.) The cars as shown on photograph, Plaintiff's Exhibit 5, were stopped substantially as shown there at the time I crossed the track after the accident. The wood ends shown in the photograph by the railroad crossing were not there at the time of the accident. Those shown in this photograph were left there last fall. Referring to Plaintiff's Exhibit 4, after the

(Testimony of E. W. Simonson.)

accident the Slocomb automobile was about in the same position as that shown in this exhibit. The automobile may be seen between the two men in the photograph. Exhibit 3 shows the railroad crossing and the bridge which crosses the river just beyond. On the day of the accident the condition of the crossing was very bad. Planks that run along next to the rails had been taken out on account of freezing, and the removal of these planks made the crossing very rough. There was no protection for a car going over the rails. It was customary to remove the planks next to the rails in the winter. The crossing had never been in condition. We lived in that district for approximately ten years, and the same condition of the crossing has always existed up to the time of the accident. The highway crossed the tracks diagonally and the fact that the planks were not kept in shape and were torn out at different times, made the road in practically impassable condition, especially after a fall of snow. The planks that were there were also worn and the space between the tracks was generally a chuck hole. The space between the industry and passing tracks, and the passing and main tracks were neither paved nor planked. [80] There were chuck holes between the tracks. The ruts at that time were probably six or eight inches deep. There was an excessive amount of travel over this crossing at this time of the year, it being the winding up of the apple season. There is a continual stream of traffic over that crossing dur-

(Testimony of E. W. Simonson.)

ing the day, sometimes running into the night. This traffic consisted principally of wagons and trucks delivering fruit to the warehouses and cars. The cars on the industry track were loaded directly from the wagons and trucks. During the apple season the cars were being loaded practically every hour from daylight to dark. At one time there would be ten or twelve teams right in there close to the crossing between the industry and passing tracks, loading and unloading not only apples, but lumber and other things as well. On the day of the accident there were approximately 15 cars of lumber on the industry track. These cars standing on the industry track were being unloaded on to trucks, which were standing between the industry and passing tracks. I saw at least two trucks on that day, loading close to the tracks. It was Thanksgiving Day.

I have been engaged in that particular business in Monitor for approximately ten years. I have an orchard of my own. I now run Mrs. Slocomb's orchard under lease. Mr. Slocomb was an excellent orchardist,—a first-class manager. Mrs. Slocomb could not get a man to do the work that Mr. Slocomb did for less than $3,000 a year. It would cost her that much to get an orchardist to manage her ranch. Managing a fruit ranch is a business which requires considerable experience and intelligence. I have ridden in the car with Cecil Slocomb, and in my opinion he [81] was a good driver. Cecil was a well built boy, over the average

(Testimony of E. W. Simonson.)

for his age. There wasn't much difference between his size and that of his father. He had been driving two or three years.

I saw Cecil driving the car practically every day. He drove to and from school at Wenatchee, eight miles from Monitor. Cecil was an exceptionally careful boy and a good driver.

Cross-examination by Mr. MATTHIAS.

The distance 22.9 feet between the industry track and passing track is measured on a straight line between the tracks. It is from the north rail of the industry track to the south rail of the passing track. I didn't measure the distance between those two tracks along the [82] highway at an angle, as Mr. Slocomb's automobile traveled the highway on the day of the accident. I presume the distance between the two tracks on an angle along the highway would be greater than that on a straight line between the two tracks. The distance of 10.32 feet, which I gave between the passing track and the main line track, is the distance on a straight line from the north rail of the passing track to the south rail of the main line track. I didn't measure the distance between these tracks along the traveled road at an angle as Mr. Slocomb's automobile traveled it on the day of the accident. The passing track between the rails is approximately four feet two inches wide. The distance from the north rail of the industry track to the south rail of the main line track, which would include the width of the passing track measure

(Testimony of E. W. Simonson.)

on a straight line, would be about 37 feet. What that distance would be on an angle along the traveled road, I do not know, as I did not measure it. On the day of the accident there was located just at the corner of the road Mr. Slocomb traveled as he approached the railroad tracks before the road turned at an angle toward the north to cross the railroad tracks, two railroad crossing signs. I can't say exactly what the signs said, but one big white sign said something like "Railroad Crossing 300 feet,—Danger," and the other was a railroad crossing sign with arms that said on it "Railroad Crossing." It is approximately 800 feet from the east end of the crossing on the industry track to the east end of the last building to the east of the crossing, marked on my map "Tile Warehouse." The river is just beyond the road, behind the schoolhouse. On the day these pictures were taken (Plaintiff's Exhibits), [83] I used my tractor to pull boxcars down on to the crossing, and to put them in the position shown in the pictures. It was my own suggestion that I use my tractor in this manner. I went both east and west of the crossing and pulled cars down to the crossing. That was in the month of January of this year. I spotted the cars according to my recollection of their position on the day of the accident, based on actual measurements which I made immediately after the accident. When I timed the train once I was standing on the front porch of Mrs. Slocomb's house. At another time out on the county

(Testimony of E. W. Simonson.)

road in front of the house. A third time I was standing 108 feet west of the house up on the road and the fourth time I was on the porch. I was looking down a straight stretch of track, and when the train coming toward me passed a certain point, I noticed the time. The point which I picked out was a stake alongside the railroad track, just as the train goes around the turn, through rock cut on its way out of Cashmere. It was a white stake about six feet high and about four by four or six by six inches in size. When the train blurred that white stake, I took the time and watched her until she had passed, approximately 160 rails or about a mile. The stake was not quite a mile up the track.

Whereupon the testimony of the witness was closed and CLARENCE BAILEY was produced as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Testimony of Clarence Bailey, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is Clarence Bailey. I have lived in Monitor about three years. On the day of the accident I was loading a carload of apples out of Sullivan & Greiner's warehouse. [84] I observed the train which struck and killed Mr. Slocomb on that day. I noticed the rear end of the train after the accident, and measured it. It was 470 feet from the present crossing to the point where I saw the rear end of the train after the accident. When

(Testimony of Clarence Bailey.)

I noticed the train it was backing up. At that time she had tooted her whistle to back up. It stopped at the car which I was loading, and that is when I saw the rear end of the train. I then turned around and went back to my work. In about three minutes a man came back and told me of the accident. I then ran around in front of the engine and up to where they were putting the bodies on the train. On one other occasion I had seen cars spotted on the industry track on both sides of the crossing, so that there wasn't more than enough room for a man to get through and another one to pass him on the crossing. With cars spotted in this way it was impossible for a man to see a train coming from the west until after he had crossed the north rail of the industry track. I have unloaded lumber between the industry and passing tracks for over two years, and there is just about room for two trucks to pass each other between these two tracks. Just at that time there had been a shortage of cars, and there had been more loading than usual on to cars from trucks standing between the industry and passing track. That applies to both west and east of the crossing.

Cross-examination by Mr. MATTHIAS.

The warehouse in which I was working on the day of the day of the accident has been burned down. There is now a hole in the ground and a part of the foundation is standing. I was working in a refrigerator-car [85] in front of that ware-

(Testimony of Clarence Bailey.)

house. I was hanging paper in the car preparatory to loading the car with fruit. Refrigerator-cars are about all the same size. They extend a little more or less than a foot beyond the ends of the ties on each side. The first thing I noticed about the train on the day of the accident was when it stopped. The rear end was opposite me. I do not know how many cars there were in the train, nor do I know what kind of a car was on the end of the train. The measurement from the point where the end of the train stopped to the crossing as it is to-day was taken by me last Friday.

Whereupon the testimony of the witness was closed, and J. L. WEYTHMAN was produced as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of J. L. Weythman, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is J. L. Weythman. I live at Monitor, where I have resided 37 years. Am engaged in raising fruit. At the time this accident happened I was at home about half a mile from Monitor. About half an hour after it happened I went to Monitor. As near as I can tell Plaintiff's Exhibits 5 and 6 correctly show the crossing at Monitor on the day of the accident. The crossing was a little rough. On an average it was not as smooth as the county road was. The principal trouble was the crowded condition of the cars on the industry track

(Testimony of J. L. Weythman.)

near the crossing. In the busy season they load and unload four or five cars a day from the industry track on to trucks standing between the industry and passing tracks.

(Plaintiff's Exhibits 17 and 18 admitted in evidence.) [86]

Plaintiff's Exhibit 17 is a letter composed by Mr. Slocomb and I, and sent to the railroad. I didn't see the Railroad Company's answer to that letter. Nothing was done about changing the crossing or correcting the conditions from the time the letter was written until after the accident. I had observed Cecil Slocomb driving an automobile and considered him a very good driver. I saw Cecil in possession of the automobile and heard him ask my daughter to ride in the car with him back and forth to school.

Mr. Slocomb was a very good orchardist. He was better than the average. In my opinion Mrs. Slocomb would have to pay $3,000 a year to get a man to perform the work Mr. Slocomb was doing. He was thrify, economical and industrious.

Whereupon the testimony of the witness was closed, and G. C. FASKEN was produced as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of G. C. Fasken, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is G. C. Fasken, and I have resided at Cashmere, Washington for nineteen years. I am

(Testimony of G. C. Fasken.)

agent for the Great Northern Railroad at Cashmere, and have been for nineteen years. I was agent on the day Mr. Slocomb was killed. Train No. 26 was due to arrive at Cashmere on the day of the accident either at 3:13 P. M. or 3:11 P. M. The train was a little late getting into Cashmere on the day of the accident. They waited for No. 1. No. 1 was due to arrive at Cashmere at 1:04 P. M. It did not arrive until somewhere around 3:20 P. M. In coming up from Wenatchee to [87] Cashmere No. 1 was really running on No. 26's time. There were eight coaches on No. 26, besides the engine and tender. There is a very slight grade, a water grade from Cashmere going east toward Monitor.

Cross-examination by Mr. MATTHIAS.

The times which I have given are leaving times, instead of arriving times. No. 26 was due to leave Cashmere at 3:13 P. M. No. 1 was due to leave Cashmere at 1:04. The time at the stations is kept according to leaving time, instead of arriving time.

Whereupon the testimony of the witness was closed and E. M. OSBORN was produced as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Testimony of E. M. Osborn, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is E. M. Osborn. I was conductor of train 26 passing through Monitor about 3:30 P. M. on November 27th, 1919. Each car was equipped

(Testimony of E. M. Osborn.)

with the regular New York automatic air-brake. The engine was also equipped with the New York air-brake. The train had the latest appliances and equipment.

Whereupon the testimony of the witness was closed, and BESSIE WEYTHMAN was produced as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Testimony of Bessie Weythman, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is Bessie Weythman. I am now a teacher in the schools at Lodi, California. All of my life before moving to California I have lived at Monitor, Washington. Our residence was about a quarter of a mile from the Slocomb [88] house. I was acquainted with Cecil Slocomb. I have known him for about eight years. From about September 1st, 1919, to November 27th, 1919, I rode with Cecil every school day to and from Wenatchee. I considered him an excellent driver. He was very careful, very observing and quick to act. I never saw him do a reckless thing.

Cross-examination by Mr. MATTHIAS.

I am an intimate friend of the Slocomb family. When I was riding with Cecil in his automobile I talked with him while he was driving, and he talked with me. At that time I didn't own an automobile, but my father did, and I knew how to drive. Cecil was about sixteen years old at the time of his death.

(Testimony of Bessie Weythman.)

He was in the second half of the sophomore year at High School. I have ridden with Cecil Slocomb in the Chevrolet Roadster, when two other persons were in the seat with us, making three persons in a two passenger roadster. I have also ridden with him when the curtains were down on both sides. I have also ridden in a Chevrolet roadster with Cecil's father, Wilson M. Slocomb. I know that Wilson M. Slocomb, the father, had driven an automobile for a good many years before the Chevrolet Roadster was purchased. I consider a careful, cautious and alert automobile driver one who drives carefully, not too fast, who watches the road, and who handles his machine quickly and easily.

Whereupon the testimony of the witness was closed, and AL ALDRED was produced as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Testimony of Al Aldred, for Plaintiff.

Direct Examination by Mr. MARTIN. [89]

My name is Al Aldred.

It was stipulated between Mr. Martin and Mr. Matthias in open court that a railroad coach body is approximately 80 feet long, some more and some less, and that a locomotive and tender are approximately 100 feet long.

Whereupon the direct examination of the witness was resumed, the witness testifying as follows:

I reside at Carlberg, Washington. Since 1916 I

(Testimony of Al Aldred.)

have been on a ranch. For fifteen years prior to that time I was in the railroad business as a brakeman and conductor. I am familiar with the stopping of trains at different speeds on the water grade. I heard the testimony that there were eight coaches in this train, each approximately 80 feet long, and the locomotive about 100 feet long, and that the train was equipped with New York automatic air-brakes. In my opinion the train with this equipment and of this length, going 60 miles an hour, should be stopped in at least a length of itself, approximately 720 feet if the coaches were 80 feet long. It would be almost impossible if the brakes were applied immediately upon seeing an object in sight ahead for a train to run over 720 feet. I have seen a train stopped at that distance in an emergency stop.

Whereupon the following proceedings were had:

Q. (Mr. MARTIN.) I will ask you if this train in question had applied the emergency-brake when 300 feet from this railroad crossing, and was traveling east at the rate of 60 miles an hour, how much time would have been saved in reaching this railroad crossing, assuming that an object was on that [90] crossing, and it was necessary to stop as quickly as possible?

Mr. MATTHIAS.—Your Honor, please, I object, upon the ground it is irrelevant, incompetent and immaterial. An engineer of a train does not have to apply the brakes the moment a person is seen approaching a railroad crossing. The law is that

(Testimony of Al Aldred.)

he has a right to rely upon the assumption that the driver will use due care and give him the right of way, and until he sees that the automobile driver is not going to do so and is going to drive into danger,—now then, there is no evidence in this case upon which counsel is entitled to rely upon the last clear chance rule; this question is not in the case, and it is immaterial.

The COURT.—This question as I understand it asks his opinion on the physical ability to do something. Read the question. (Question read.)

Mr. MATTHIAS.—The purpose of the question, your Honor can see, has to do with the last clear chance rule, which is not in this case.

The COURT.—I do not understand it so. Objection overruled.

Mr. MATTHIAS.—Exception.

A. It is my opinion that the train would have been detained approximately three seconds in that distance, traveling at a speed of 60 miles, if he had throwed the emergency-brake in full force, which applies on the whole entire train. He could not have helped but detain the train at least three seconds in stopping it in that distance.

Whereupon the direct examination of the witness was continued by Mr. MARTIN, and he testified as follows: [91]

Going 60 miles an hour, with an application of the emergency-brakes, the speed of the train should have been reduced in 300 feet, to approximately 35 miles an hour. Going at 35 miles an hour, the

(Testimony of Al Aldred.)

train should have been stopped with the emergency-brakes within 300 feet. I am of the opinion from my experience that high-pressure speed brakes will hold a train of eight cars better than the same pressure air-brakes would hold a train of two or three cars, because the braking power overcomes the excess weight of the extra cars. Assuming that this train ran until the rear end of its last car was 470 feet east of the crossing when it stopped,—assuming the train was 720 feet long and that the brakes were applied 50 feet west of the crossing, it is my opinion that the train was going at an approximate speed of 65 miles an hour.

Cross-examination by Mr. MATTHIAS.

The chances are that this train was going 100 miles an hour.

Whereupon the testimony of the witness was closed, and C. J. JUDKINS was produced as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of C. J. Judkins, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is C. J. Judkins. I resided in Seattle since 1903. I have been in the railroad business as yardman, brakeman and conductor. I am familiar with the distances at which a train can be stopped, equipped with the latest appliances and a full head of air, and running at different speeds. In my opinion a train of eight cars besides the locomo-

(Testimony of C. J. Judkins.)

tive, equipped with New York air-brakes, [92] with a full head of air, and running at 60 miles an hour down a water grade, could be stopped in between eight and nine hundred feet. One should have no difficulty stopping within that distance with an emergency application. If a full application of the air was made to that train 50 feet west of the crossing and had run 1220 feet after that application, and there was a continuous application of the air, in my opinion the train was going at least 65 miles an hour.

Whereupon the following proceedings were had:

Q. (By Mr. MARTIN.) I will ask you within what time this train could have been stopped had the air been applied, the emergency applied at 300 feet west of the crossing?

Mr. MATTHIAS.—The same objection. (On the ground it is incompetent, irrelevant and immaterial.)

Q. (By Mr. MARTIN.) Running at 35 miles an hour.

The COURT.—Objection overruled.

Mr. MATTHIAS.—Exception.

A. Why, he could have stopped before he reached the crossing, or by the time he reached the crossing, anyway.

Q. Had the train been running at 60 miles an hour, how much time could he have saved if he had applied the emergency 300 feet west of the crossing? How much time could he have saved in seconds or fractions from the application of the

(Testimony of C. J. Judkins.)

air 300 feet west of the crossing, until he reached the crossing?

Mr. MATTHIAS.—The same objection.

Q. How much could he have slowed down?

Mr. MATTHIAS.—And the further objection it is purely speculative. The witness is not shown to be qualified to answer upon that subject, and it is not a subject of expert testimony. [93]

The COURT.—Objection overruled.

Mr. MATTHIAS.—Exception.

A. Why, in that length of space, on an emergency application, he should be able to stop in a fraction of a minute, say three to five seconds.

Cross-examination by Mr. MATTHIAS.

I am now engaged in auditing freight receipts for Clifton & Company, for the purpose of laying foundation for rebates for overcharges on freight bills. Before that I was cargo clerk for the Steamship Company. Before that I was with the Pacific Coast Railroad. They have about 35 or 40 miles of track. It is a coal road here. I was with them fourteen months, braking in the yard. Before that I was with the Northern Pacific as a freight passenger conductor from 1909 to 1915. From 1893 until about 1903 I was with the Great Northern in Minnesota. My last service with them was as yardmaster. I was once a conductor on the Kalispel Division. I started out on the Great Northern as brakeman. I was also with the Chicago and Great Western in Milwaukee. I have fired some, and run the engine some in switching around the

(Testimony of C. J. Judkins.)

yard. I didn't run an engine as a regular thing,—maybe for thirty [94] minutes or something like that at a time around the switchyard. The engine would be doing about 15 or 20 miles an hour. I have never run an engine in regular service, but I have been in an engine when the engineer was running it. I have been riding in the cab of an engine when they had a front end collision. Once I was with the engineer in the cab going down past the Buckley line when we were going 60 miles an hour. That was on a freight train on the Buckley branch of the N. P. towards Puyallup. We had 45 or 50 loaded cars, and were going 60 miles an hour down a water grade.

Whereupon the testimony of the witness was closed and INEZ PETERSON was recalled as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Testimony of Inez Peterson, for Plaintiff (Re called).

Direct Examination by Mr. MARTIN.

My name is Inez Peterson. I have ridden with Cecil Slocomb in his Chevrolet roadster, while I was teaching school in Wenatchee. Bessie Weythman rode with us. I rode with him every day for a little over a week. I considered Cecil a very careful and observing driver.

Whereupon the testimony of the witness was closed, and RALPH WAYNE LONG was produced as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

Testimony of Ralph Wayne Long, for Plaintiff.

Direct Examination by Mr. MARTIN.

My name is Ralph Wayne Long. I was living at Monitor on November 27th, 1919. Our house is about three-quarters of a mile northwest of Monitor along the railroad tracks. [95] The photograph, Plaintiff's Exhibit 1, shows the Great Northern Railway just west of the curve at Monitor. I have placed a cross on the photograph at the point where our house was located. After I heard the whistle of train 26 at the crossing west of the house on the day of the accident, I started from the house toward the railroad track, and walked up the railroad track to Monitor to get the mail. I had to walk 125 feet from the house to get up on to the track, and then walk east along the track to Monitor. I observed Train No. 26 passing our house at 3:30 P. M. When I came out of the house the train was at the crossing west of the house. I observed the train passing east in front of our house until it had gone around the curve toward Monitor. I was just on the outside of the right of way fence as the train went by. I followed the train down the track. The semaphores are about a quarter of a mile from the Monitor station. Train 26 gave three short blasts of the whistle right at Monitor, just west of the

(Testimony of Ralph Wayne Long.)

Monitor crossing. It did not give any whistles near the semaphores. It did not give any whistles other than the whistle at the crossing west of our house and the three short whistles at Monitor. The train was in sight and I observed it until it passed around the curve at the semaphores. If it had whistled at a point a quarter of a mile west of Monitor, I could have heard it. Of the three whistles given at Monitor, two were short and the last one was longer. I then hurried toward Monitor as I recognized the last whistle as a danger whistle. When I got around the corner by the semaphores the train was stopped, and there was a crowd at the station. The train was not at the station when we got there. The whistling-post for the Monitor crossing [96] is just a few feet east of the semaphores. Train 26 did not give any whistles for the railroad crossing at Monitor, as it went east that day. The train was running about 60 miles an hour. My brother, W. E. Long, was with me.

Cross-examination by Mr. MATTHIAS.

I was living with my two brothers near Monitor. I was 19 at that time. I was employed by Sullivan & Greiner. Had been working for them a month. I worked for them about two weeks after the accident; then went to Auburn, Washington. Auburn was my permanent home at the time. I stayed there about a year and a half. From Auburn I went to Salem, Oregon. I stayed there about three months. Then I went to Forest Grove, Oregon. Then I went to Oregon City. I lived there about

(Testimony of Ralph Wayne Long.)

six months. Then I went to Puyallup. I live in Puyallup now. I am not now employed. I was not working all the time at these various times. I cannot say how much time I have been working within the last two years and a half. I haven't any idea. I knew how to drive an automobile at the time of this accident. I had driven several different kinds. I don't remember how many cars were in the train. I don't know whether it had an observation car. I noticed the back end was just passing me when I was within 5 feet of the right of way fence, and it was about 50 feet from the fence to the track. I don't remember what day of the week the accident happened. It was Thanksgiving Day, but what day of the week it was I don't know. As the train passed me it was making considerable noise. The sound of the wheels and the heavy coaches on the rails made a good deal of noise. I could hear it plainly enough. By the time I got up on the track the train was around the bend out of sight. I wouldn't say for sure that I was looking [97] at the train when the engine reached the whistling-post. We couldn't see the train when the engine gave the three short whistles. The accident had occurred, the men had been loaded on the car, and the train had left by the time we got to Monitor. I knew the train always whistled at that crossing west of our house. I had observed that before, and I was waiting for the whistle before I started for the mail. I had every reason to be paying attention to the whistle before going for the mail, but

(Testimony of Ralph Wayne Long.)

I had no particular reason to be paying attention to the whistle that might be given at the Monitor crossing.

Whereupon the testimony of the witness was closed and the following proceedings were had:

Mr. MARTIN.—By agreement I will read Rule No. 15 of the Great Northern Railroad. The rule is under the heading "Trouble Signals, Engine Steam Whistle Signals."

> "Note. Signals prescribed are illustrated by o for short sounds, and dash for longer sounds. The sound of whistle should be distinct with intensity and duration proportionate to the distance the signal is to be conveyed. Approaching public crossings at grade, obscure places, tunnels, or snowsheds should give '—— —— o o,' two long and two short whistles. Approaching stations, junctions and railroad crossings at grade one ——."
>
> Rule 38 reads: "The whistle must be sounded in accordance with the rules, one-half mile from stations, railway crossings, drawbridges and junctions, and also one-quarter of a mile from public road crossings at grade [98] and when approaching obscure places and before entering tunnels or snowsheds."

Whereupon P. H. PRITCHETT was recalled as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Testimony of P. H. Pritchett, for Plaintiff (Recalled).

Direct Examination by Mr. MARTIN.

It looked to me like Mr. Slocomb was nearer dead than Cecil. Life was almost gone in the boy, and Mr. Slocomb just spoke one word. He said, "I am hurt." So I would take it Mr. Slocomb lived the longer of the two. The boy's injuries were more severe than his father's. The father's pulse was beating yet when I got to him and the boy's wasn't.

Whereupon the plaintiff rested.

Motion for Nonsuit.

At this time the defendant submitted to a motion to discharge the jury from further consideration of the case and enter a judgment for the defendant and against the plaintiff, on the ground that the evidence showed, as a matter of law, that the defendant was not guilty of negligence, and that the deceased was guilty of contributory negligence as a matter of law.

This motion was denied by the court, and an exception allowed for defendant.

Motion to Withdraw Last Clear Chance Rule from the Jury.

At this time the defendant submitted a motion to withdraw from the jury the issue of the last

clear chance [99] rule upon the ground that on the plaintiff's evidence there was no evidence in the case upon which that rule could be submitted to the jury.

This motion was denied by the Court and exception allowed for the defendant.

DEFENSE.

Testimony of C. W. Sherman, for Defendant.

C. W. SHERMAN, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is C. W. Sherman. I am a civil engineer, employed by the Great Northern Railway, and was with that Company when it was controlled by the Government under Railroad Administration. I have made a survey of the crossing at Monitor, where this accident occurred, with reference to all conditions and objects as they existed on Nov. 27, 1919. I have carefully transcribed the results of that survey, upon this map marked Defendant's Exhibit "D."

Whereupon the map marked Defendant's Exhibit "D" was offered and received in evidence.

The witness then continued to testify as follows, upon direct examination by Mr. MATTHIAS:

The measurements at this crossing at the time the accident occurred were as follows: The width of the crossing planks on the industry track, passing, and main line tracks were 32 feet. The distance between the industry track and the passing

(Testimony of C. W. Sherman.)

track; in other words, between the North rail of the industry track and the South rail of the passing track along the road along which Mr. Slocomb's automobile traveled [100] in going across this crossing was 33.8 feet. The distance between the passing track and the main line; or, in other words, between the North rail of the passing track and the South rail of the main line along the traveled road was 14.2 feet. All three tracks are standard gauge, and measured on a straight line are 4.7 feet between the rails. The total distance along the traveled road between the industry track to the main line; or, in other words, between the North rail of the industry track and the South rail of the main line is 54.8 feet. The ties extend 1.7 feet beyond the rails, and a refrigerator-car extends approximately 6 inches beyond the end of a tie. From the beginning of the tangent at the North end of the turn in the road around which turn Mr. Slocomb came from his house toward the railroad track on the day of the accident to the North rail of the industry track is 172 feet. The distance from the East end of the warehouse just West of the crossing to the center of the crossing on the industry track is 56 feet, and from the East end of the warehouse just west of the crossing to the West end of the crossing is 40 feet. The distance from the telephone pole that stands just to the East of the warehouse West of the crossing to the end of the crossing is 29 feet. The telephone pole is 11 feet East of the warehouse. The West end of the station

(Testimony of C. W. Sherman.)

platform is 78.3 feet from the East end of the crossing on the main line.

The distance from the center of the main line crossing to the West up the railroad tracks to the semaphores is 1505 feet. The semaphores are located on the map at the point marked "semaphore 19–04." The parallel dotted lines [101] on the map indicate the used road leading from Mr. Slocomb's house toward the crossing where the accident happened. The object marked "house" on Exhibit "D" across from the semaphores represents Mr. Slocomb's house. A man traveling North across this crossing, passing a line of box or refrigerator-cars standing on the industry track to the West of the crossing, after passing the cars on the industry track, can see up the main line track in the direction of the semaphores 1600 feet. The beginning of the tangent of the curve in the tracks west of Monitor is 1400 feet from the crossing. It is a 2°5′ curve. It is 3724 feet from the crossing where Mr. Slocomb met with this accident to the first country crossing West of Monitor. The whistling-post for the crossing West of Monitor is a quarter of a mile West of that crossing. The crossing West of Monitor is 2200 feet west of the semaphores. The map marked Exhibit "D" is drawn to a scale of 50 feet to one inch. The width of the traveled highway just before it comes to the double highway at the industry track is 20 feet. The width of the two highways as they come in together just before they cross the industry track is 32 feet.

(Testimony of C. W. Sherman.)

Cross-examination by Mr. MARTIN.

I made these measurements and prepared this map in August, 1921, except a few that I took last Friday. The measurements are made from the crossing as it was at the time of the accident. I took the location of the crossing as it was at the time of the accident from our records.

Redirect Examination by Mr. MATTHIAS.

The former roadmaster, Mr. Nelson, assisted me in locating objects as they were in 1919. He is here as a witness. [102]

Testimony of J. A. Nelson, for Defendant.

J. A. NELSON, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is J. A. Nelson. At the present time I am section foreman for the Great Northern Railway Company. On November 27th, 1919, I was roadmaster for the Great Northern in the Fifth District, which included Monitor. I was at the crossing where this accident happened the next morning after the accident, at about 8:30. I am familiar with the condition of the crossing as it was at that time. I was present when Mr. Sherman made his survey in 1921 for this map, and I showed him where the crossing stood in 1919. There has been no change in the railroad tracks since the accident. Outside of the fire that burned the building located at the point on defendant's map marked "old foundation" and an adjoining building. The

(Testimony of J. A. Nelson.)

warehouses were located at the time this accident happened the same as they appear on this map. The depot was in the same place. The building opposite the warehouse east of the railroad track, marked "house" was in the same place. In November, 1919, a restaurant and soft-drink parlor was located in that building. The object on the map marked "one story building" was there in 1919, and used as a garage. The object marked "concrete store" was a general store in 1919. The object marked "FR Building," and the postoffice opposite, was a small store and the Monitor postoffice in 1919. The railroad crossing was in good condition at that time. Each track was planked with double planking 16 feet long. The planks on the industry and passing tracks were 3x7x10, and those on the main line 3x10x16, making the crossing 32 feet wide, [103] ballasted between the planks and the tracks with gravel and cinders. The road was as smooth as it could be made with gravel and cinder ballast. There were no chuck holes or big ruts in it. The surface was hard. There were no crossing planks out or torn up. No work was done after the accident on this crossing for five months. Defendant's Exhibit "I" for identification shows a part of the crossing and cross road over main line and passing track, and just a little bit of the corner of the cars on the industry track. You can see the passing track and the main line track and just the edge of the cars standing on the industry track. The crossing looks in that picture, just the same

(Testimony of J. A. Nelson.)

as it did on November 27, 1919. The picture shows the crossing within 3 feet of the North rail of the industry track.

Defendant's Exhibit "J" shows the main line track and West to the passing track and the cars standing on the industry track. The planks in the foreground in the picture are the crossing on the main line. It looks exactly the same in the picture as it did on November 27, 1919.

Defendant's Exhibit "K" shows the crossing looking North along the road toward the river. The river is 1,200 or 1,300 feet or more from the crossing. The crossing looks the same in that picture as it did on November 27, 1919.

Defendant's Exhibit "L" shows the crossing from the industry track across the passing track, and main line, looking north toward the river, and the crossing looks the same as it did November 27, 1919.

I noticed the position of the boxcars that stood on the industry track to the east and west of the crossing, [104] when I reached the crossing at 8:30 the next morning after the accident. There had been no switch movement in the meantime that I know of. There had been no switch movement either Thanksgiving night, or early that morning. At that time the west end of the car that stood east of the crossing at Monitor was about 10 feet east of the highway. Defendant's Exhibit "K" shows the position of that car, as it was at that time the next morning.

I also noticed the position of the car that stood

(Testimony of J. A. Nelson.)

West of the highway crossing with reference to the distance from the crossing. The east end of that car was 40 feet from the west end of the crossing. The east end of the car was about 20 feet west of the corner of the warehouse; in other words, back of the warehouse about 20 feet. Defendant's Exhibit "E" shows the car to the west of the crossing as it stood when I got to the crossing the next morning. The ice that is shown in Exhibit "D" was taken out of the cars on the morning of the 28th by the section crew. They were doing that work while I was there. On the afternoon of the 29th I passed through Monitor on the train and noticed the position of the cars with reference to the ice, and the car to the west of the crossing had not been moved at that time. The car shown in Exhibit "E" is a refrigerator. The car standing to the east of the crossing was a boxcar. A refrigerator-car extends about 6 inches beyond the ends of the ties. There was no snow, and no patches of snow on the ground at the time of the accident. You cannot hear the river from the crossing at the depot unless it is during high water, or on a quiet evening. There was no high water during the fall of 1919. It was a dry fall. [105]

Defendant's Exhibits "E" to "L," inclusive, admitted in evidence.

Cross-examination by Mr. MARTIN.

On the afternoon of November 27, 1919, I was working around my office and the yards in Wenatchee. I heard of the accident when No. 26 reached

(Testimony of J. A. Nelson.)

Wenatchee. It was too dark to go up to Monitor that evening, and I went up the next morning to look over things, and make a report. I took the distances by spacing, but did not make any measurements with the tape. The first thing I did was to space the distance from the crossing over to the first car west of the crossing. The section men were working there at the time throwing ice out of the bunkers of all the cars. Sometimes the cars around there are moved with a pinch bar to spot them for loading apples. The car west of the crossing was not spotted at the door of the warehouse the next morning. There were not two cars of cinders placed on this crossing the week after the accident. We did not take out any of the crossing planks in the Monitor crossing that fall. It is not customary to do that at public crossings. There were no broken planks in this crossing.

Redirect Examination by Mr. MATTHIAS.

The distance from center to center of the ties on the side-track is 30 inches, on the main line 24 inches. In Defendant's Exhibit "E" 19 ties may be seen, counting from the road to the car. When I saw the cars west of the crossing the next morning, they were cleaning the ice out of the bunkers, getting the cars ready to load with fruit. There was no engine there, and I did not see any crow bar, or any machinery of any kind for moving a car. Defendant's Exhibit "M" is a photograph of the wagon road and the track looking west from [106]

(Testimony of J. A. Nelson.)

the Monitor crossing toward Cashmere. The road shown is the main wagon road running down toward Monitor. The picture is taken in the vicinity of Mr. Slocomb's house. The conditions shown in the photograph are the same except for the snow. Defendant's Exhibit "O" is also a picture taken from the vicinity of Mr. Slocomb's house, looking toward Monitor. The conditions in the picture are the same, except that the road was straighter in 1919, where the bend is shown in the picture, and there was no snow at that time. In the background there are also some buildings that were not there in 1919, but those buildings are not in the vicinity of the crossing. Defendant's Exhibit "N" is the Slocomb residence, showing it as it looked in 1919. Defendant's Exhibit "P" is a picture of the wagon road looking east, showing the railroad crossing signs as they appeared on November 27, 1919.

Cross-examination by Mr. MARTIN.

There were some planks worn in the industry track, but not very much. There were no broken planks.

Testimony of F. G. Christian, for Defendant.

F. G. CHRISTIAN, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is F. G. Christian. I am a photographer. I took some pictures for the Great Northern Railroad at Monitor in the forenoon of November

(Testimony of F. G. Christian.)

29, 1919. When I took Defendant's Exhibit "E" my camera was in the center of the industry track 59 feet from the main line crossing. The man shown in the photograph standing up the main line is 464 feet from a point on the main line crossing opposite my camera. When Defendant's Exhibit "F" was taken my camera was in the center of the highway [107] 49 feet from the center of the main line crossing, in a straight line along the highway. All measurements were taken along the highway to get position of camera. When Defendant's Exhibit "G" was taken my camera was in the center of the highway, 39 feet from the main line crossing. When Defendant's Exhibit "H" was taken my camera was in the center of the passing track 21 feet from the main line crossing. When Defendant's Exhibit "I" was taken my camera was a little bit east of the highway, so as to show the road, 40 feet from the main line crossing. The picture is looking west and north. All the pictures that have just been mentioned look west, and the measurements were taken by me with a steel tape. The semaphores may be seen in Defendant's Exhibit "I," down the main line track in the background. Defendant's Exhibit "J" was taken looking west from the center of the main line crossing. When Defendant's Exhibit "K" was taken my camera was 89 feet south of the center of the main line crossing. The picture was taken looking north. The photograph shows the industry track in the foreground, then the passing track and the main

(Testimony of F. G. Christian.)

line track in the background. When Defendant's Exhibit "L" was taken my camera was 57 feet from the center of the main line crossing looking north along the highway across the track.

I took Defendant's Exhibits "M," "N," "O," and "P" January 23, 1922. When Defendant's Exhibit "M" was taken my camera was standing in the road opposite Mr. Slocomb's house, looking west, north and east, showing Monitor in the distance of the picture on the right, and looking toward Cashmere on the west, showing the river in the background. I did not notice any noise from the river when I took the picture. Defendant's Exhibit "N" is a photograph of the Slocomb house. This picture was taken with my camera in the same position it was [108] in when Exhibit "M" was taken, except that the camera was turned around. When Defendant's Exhibit "O" was taken my camera was about 400 feet east of the Slocomb house, and the picture was taken looking toward Monitor, showing Monitor in the background. When Defendant's Exhibit "P" was taken my camera was 75 feet from the railroad crossing danger signal shown in the picture. The telegraph pole blocks out some of the figures in the sign.

Cross-examination by Mr. MARTIN.

I used an Eastman camera. It was not a wide angle camera. I did not purposely try to show a big space in the picture. I did not try to get the impression with my camera that the space was

(Testimony of F. G. Christian.)

wider than it was. I focused before I took each picture. The claim agent for the Great Northern gave me the instructions in regard to taking the picture. I do the regular work for the claim agent.

Testimony of Joseph A. Mallok, for Defendant.

JOSEPH A. MALLOK, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is Joseph A. Mallok. I live at Cashmere, Washington, and am section foreman for the Great Northern Railroad. On the day of the accident, November 27, 1919, I was so employed but was on a vacation. The last time I was at this crossing before the accident was on Saturday of the preceding week, the accident happening on the following Thursday. On that occasion the crossing was in good condition. On that day I cleaned the crossing between the planks and the rails. (Defendant's Exhibits "M," "N," "O" and "P" admitted in evidence.) There were no chuck holes or ruts in the crossing. The next time I was at this crossing was on the 10th or 11th of December. There had been no work done on it in the meantime, and it was in practically in the same condition that it was in on the Saturday before the accident. [109]

Cross-examination by Mr. MARTIN.

The crossing planks last about three or four years.

Testimony of Dana Haskins, for Defendant.

DANA HASKINS, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is Dana Haskins. I am a railway mail clerk employed by the United States Government, and live in Seattle. I was a mail clerk on Great Northern Train 26 on November 27, 1919. I had been on that run for about one year. Dalton was engineer on Train 26 on that day. I had made the run with Dalton once every 15 days during that year; in other words, twice a month, or 24 times during the year. As we went into Monitor on the day of the accident the engineer gave a long whistle. We call it the "crane whistle" as it is a signal to us to get ready to catch the mail going through Monitor. It is also the station whistle. I was by myself in the car, and very busy, and was depending upon the engineer for this whistle. When I heard it, I quit my work distributing mail, and walked leisurely to the door. When I opened the door I found we were on the turn rounding the last turn before we go into Monitor. I remember distinctly hearing two short whistles as I opened the door. They were loud and very distinct. At that time the train was rounding the last curve as it went into Monitor. I picked up my pouch that was on the floor and held it in my hand until we were about 300 feet from the crane. Then the engineer gave a very sharp whistle, and I looked out

(Testimony of Dana Haskins.)

to see what was the matter. This was a startling, a peculiar whistle. It was not like an ordinary whistle. As I started to look the air was applied and I was knocked off my balance, so that I came near missing the mail catch. [110] After this last whistle the air was applied before I had a chance to look ahead as I had started to do. It was a violent application of the air. I have never experienced a harder application. The car buckled. About that time something dropped immediately in front of me. We were close to the depot and I noticed an automobile tire going down the road. The train was slowing down and then we stopped. I threw the catcher arm forward, and leaned out on it, and looked back. By that time the train was stopped and I could see that the rear end of the train was over the crossing. It looked to me like the rear end of the train was just clear of the crossing. I did not get out of my car, but the engineer got out of his engine and went back before he backed up the train. In my opinion the train was going about 40 miles an hour as it went around the curve. I heard three distinct whistles as we went into Monitor.

Cross-examination by Mr. MARTIN.

I am positive about hearing three different sets of whistles. I first heard a long whistle of the station whistle. I do not know just where the train was when that whistle was given. The next whistle I heard consisted of two short whistles. They were

(Testimony of Dana Haskins.)

given on the last curve as we went into Monitor. The third whistle was given when we were about 300 feet from the crane. At that time I was standing in the door with my left hand on the catcher arm, ready to operate it. It is a part of my business to hear these whistles, and I cannot hear them unless they are given.

Redirect Examination by Mr. MATTHIAS.

The mail crane is a white stick that stands by the crossing in the photograph marked Defendant's Exhibit "I." [111]

Testimony of M. J. Dalton, for Defendant.

M. J. DALTON, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is M. J. Dalton. I am a locomotive engineer for the Great Northern Railway and have been so employed 22 years. I was the engineer on Train No. 26 on November 27, 1919, when it collided with Mr. Slocomb's automobile. The crossing west of Monitor is about three-quarters of a mile from the town of Monitor. The mile board for Monitor is possibly a quarter of a mile beyond this crossing. There is a whistling-post for the crossing West of Monitor close to this mile board. I whistled twice for that crossing on that day because I saw a couple of automobiles on my side. They stopped and waved at me as I passed. The bell was ringing from the time we left Cashmere. It was operated automatically by air. We were just leaving the

(Testimony of M. J. Dalton.)

passing switch at Cashmere when I turned on the valve which starts the bell ringing. It is about 2½ miles from Monitor to that switch at Cashmere. After passing over the crossing West of Monitor we went down around the curve toward Monitor. As we rounded the curve into Monitor on the East end of it and probably about 1400 or 1500 feet from the crossing I sounded the whistle for the Monitor crossing. I would judge we were making about 45 miles,—35 or 36 miles an hour, as we went around the curve. When I gave the first whistle for the crossing as we went around the curve, we were not quite on the straight track, so that the crossing was not yet in my view. I always pull the whistle a second time for this crossing. We had run probably 1000 feet more, and I was reaching for the whistle to pull it again, and just as I was doing so the Slocomb car came from behind a boxcar standing on the industry track. We were then about 300 feet from the [112] crossing. It was a road crossing whistle that I gave at that time. It was very loud. As I started to pull the whistle the automobile was just coming into view. As I finished it was in full view. Prior to that time I had not seen the automobile. It came from the south and was going north. Then I saw the wheels of the automobile begin to turn as if they were going down between the passing track and the industry track. The automobile hesitated a moment and then came up on the passing track. I could not tell how fast the automobile was going. They would

(Testimony of M. J. Dalton.)

go a little ways and almost stop, and then go again and almost stop. As it came up on the passing track it almost stopped. It was partly over the passing track, and then started for the main line, and I set the emergency automatic air-brake. That makes as quick a stop as one can make with the brakes. I did not know they were intending to cross the main line track until they started from the passing track. I think we were about 75 feet from the crossing when I applied the air. I gave her all the air we had, and the brakes took hold very suddenly and very good. After the train came to a stop, I got off the engine and went back. The bodies were lying on the west end of the depot platform. I went back before I moved my train again. In going back I went around the end of the train, around the observation car, and I would say that it was about 15 or 20 feet east of the crossing. I had to go around the end of the train because the engineer is on the right side of the engine, and around the end of it to get to the place where the bodies were. [113]

Cross-examination by Mr. MARTIN.

The reason I did not put my air on the first thing was because I had no way of knowing what the automobile was going to do. I saw the auto go and then stop, hesitate, twice. The reason I did not put my air on after the automobile had hesitated the first time was that I thought they would not try to go across ahead of us. At the coroner's inquest I testified that the automobile was absolutely sta-

(Testimony of M. J. Dalton.)

tionary with its hind wheels just inside of the south rail; that I thought it was getting across, and then when I saw it stopped I reached for the brake valve and throttle at the same time. I had my hand on the brake valve handle from the time I let go of the whistle lever, when the engine was 300 feet from the crossing, and immediately applied the brakes. I used my right hand to apply the air, and the left hand for the whistle. I applied the air when my engine was about 75 feet from the crossing. I did not put the air on immediately after I let go the whistle, when I was 300 feet from the crossing, because it looked to me like the automobile was going to stop. I did not know that if I slowed down there would be less danger of hurting the people in the automobile than if I kept going. There is no half-mile post going into Monitor. The rules provide that the station whistle is to be given one mile out. No station whistle at the half-mile point was required. The crossing whistle is required 1350 feet from the crossing. The Great Northern book of rules shown me was not the book in effect at the time of the accident. The rules that were in effect provided for a station whistle one mile from the station. The first whistle I gave going into Monitor on the day of the accident was a long whistle,—[114] the regular crossing whistle. It was given one mile out of Monitor. At the coroner's inquest right after the accident I testified that as we rounded the curve just west of Monitor,—I judge that it was about half a mile from the crossing, I

(Testimony of M. J. Dalton.)

whistled for the crossing, a real long whistle. I meant by that I whistled the regular crossing whistle, at long intervals. Just before the engine struck the automobile, and 300 feet from it I gave four whistles, two long and two short. The whistle was not blowing at the moment the engine struck the automobile. That is the regulation road crossing whistle. I consider it a danger whistle. We have what is known as a danger whistle, but I did not give that because I did not think it was necessary. I supposed the automobile would stop when the occupants heard that road crossing whistle the second time. I had no way of telling what the automobile was going to do. I did not give the danger signal because I thought the automobile was going to stop, and I did not put the air on because I thought it was going to stop. Then I thought the automobile would get across, and did not put the air on for that reason. You see when the automobile come over the passing track, I had my hand on the brake. If he had kept on going the same speed he would have gotten across before I struck him. I cannot say how fast the automobile was going. It was traveling along the public highway. The automobile was not on the track when the train was 300 feet away. I could not say how much I would have saved if I had put the brakes on when the engine was 300 feet from the crossing. It would take about 850 feet to stop my train with eight coaches, running at 35 miles an hour. The report of the coroner's inquest where it is said that I testified I could [115] stop the

(Testimony of M. J. Dalton.)

train in 400 feet is either a clerical error or a mistake on my part. If you look through the report of the coroner's inquest you will find that I said that it could be stopped in something like 850 feet. I put the brakes on when my engine was 75 feet west of the crossing. I had eight coaches in my train, and when the train stopped the rear coach was 15 or 20 feet east of the crossing. I ran approximately 800 feet. There is no way of telling how quickly you can stop a train. It is all guesswork. You could not stop a train going 32 to 35 miles an hour, properly equipped with air-brakes, inside of 400 feet. There is no way of telling how much you could reduce the train speed within 400 feet. I had not used any brake power from the time we left Cashmere, so that as we went into Monitor we had a fully charged train line, and everything first class. At the coroner's inquest I testified that on that grade, which was a water grade, I did not know as a person could stop the train in a much shorter distance than 850 feet.

Testimony of E. M. Osborn, for Defendant.

E. M. OSBORN, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is E. M. Osborn. I am a passenger conductor of the Great Northern Railway, and have been so employed 18 years. I was conductor on this train the day of the accident. I was riding in the forward end of the second car from the rear. I was

(Testimony of E. M. Osborn.)

talking to the porter, and did not notice the whistle as we went into Monitor. The first thing that attracted my attention was the whistle near the crossing. It was like one long whistle, yet there was a little hesitation. It was something more like two whistles. It was very loud. [116] The air was applied about the same time. It was a severe application of the air. I went to the head end of the car, and after the train stopped got off at that end. I went toward the rear end of the train, and found the bodies on the west end of the depot platform. The rear end of the train was standing about 5 or 10 feet east of the crossing. I made a hasty examination of the three enginemen, and gave instructions to the engineer and brakemen about backing up the train. At that time the train had not been moved at all since it stopped. I went to the phone and notified the dispatcher. After the engineer had got on the engine the train was backed up. The train was backed up probably 500 feet so that the baggage car was spotted opposite where the men were lying. We put the bodies in blankets and loaded them in the baggage car, and left immediately for Wenatchee.

Cross-examination by Mr. MARTIN.

The whistle that I heard was an alarm whistle, and not a regular crossing whistle. The brakes came on very quickly.

Redirect Examination by Mr. MATTHIAS.

When I heard the whistle I noticed the speed of

(Testimony of E. M. Osborn.)

the train, which I should judge was 30 to 35 miles an hour.

Recross-examination by Mr. MARTIN.

While I was talking to the porter I did not pay any particular attention to the speed. [117]

Testimony of Ralph E. Young, for Defendant.

RALPH E. YOUNG, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is Ralph E. Young. I am a passenger brakeman for the Great Northern Railroad. I was rear brakeman on this train on the day of the accident I was riding in the smoking-room of the observation car. I was conversing with some passengers, and did not notice the speed as we went into Monitor. The first time I knew anything was wrong was when I felt the contact of the air. It was a severe application. I did not hear any shrill blasts of the whistle. I got up immediately and went to the rear of the train, and looked out. The observation car was the last car of the train. The train was stopped when I looked out, and the rear end of the train was 5 or 10 feet east of the highway crossing at Monitor. The bodies were in the corner at the west end of the depot. I got down on the ground and went back to flag the rear end of my train, and stayed there flagging until the train went out.

Testimony of C. F. Seavey, for Defendant.

C. F. SEAVEY, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is C. F. Seavey. I am a passenger brakeman for the Great Northern, and was head brakeman on this train on the day of the accident. I was riding in the front end of the smoking car, which was the third car back from the engine. The train was going at the usual speed as it went into Monitor,—about 35 miles an hour. I heard the station whistle as we approached Monitor. We were about a mile out of Monitor when it was given, and it was given at about the usual distance for the station whistle. I would say we were about a quarter or [118] half a mile east of the mile board, when the crossing whistle was given. I did not look out of the window. I am just making an estimate. The next whistle I heard was close to Monitor. It was a distinct, sharp, shrill whistle. The air was applied immediately. It was a severe application, —what we call an emergency application. I was standing up at the time, and it threw me against the side of the coach; then we came to a stop. I got off the train and went back to the bodies. The rear end of the train was standing 5 or 10 feet east of the crossing. The bodies were lying by the operator's window at the west end of the depot.

Cross-examination by Mr. MARTIN.

I was on the front end of the train. I was not

(Testimony of C. F. Seavey.)

on the train when it backed up. I was on the ground by the bodies when it backed up. The whistle that I heard at the time that the brakes were applied is what we call the crossing whistle. It was a shrill whistle. The whistle given at the time the brakes were applied consisted of two long and two short. I only heard the crossing whistle. It was given a short time before the brakes were applied. They were all shrill whistles, as shrill as a whistle can whistle. The whistle is a shrill whistle, sharp.

Testimony of Arthur P. Norrdin, for Defendant.

ARTHUR P. NORRDIN, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is Arthur P. Norrdin. I am express messenger and joint baggage man and dynamo tender on the Great Northern Railway, employed jointly by the American Railway Express and the Great Northern. I was acting in that capacity on the day of this [119] collision. Approaching Monitor I was on the first car back of the engine. This car was half mail and half baggage and express. Mr. Haskins was mail clerk. The part of the car devoted to mail is the first half. I was in the second half. On the day of the accident I heard whistles as we rounded the curve going into Monitor. It was a loud whistle. It sounded to me like three whistles. When we were about 500 feet east of the west switch I heard a shrill intermittent whis-

(Testimony of Arthur P. Norrdin.)

tle. I braced myself for the application of the air, and after we had gone about 200 feet the air came on. It was a severe application. As we rounded the curve we were going at about the average speed, 30 or 35 miles an hour. I have ridden with Mr. Dalton as engineer off and on for the last 12 years. I have never known him to exceed the speed between Leavenworth and Wenatchee. We will notice the speed in the baggage-car if the curves are taken too fast, because we have got to pile the stuff so that it will ride, and so that it will not tip over when going around curves. After the train stopped I left the car in charge of the mail clerk and went back. I saw the Chevrolet roadster with the rear end smashed and the head end not smashed. The bodies were lying about between the chair car and the sleeper. The rear end of the observation car was about 10 or 20 feet east of the crossing.

Cross-examination by Mr. MARTIN.

I was in the rear end of the first car, a steel car. It was a 70 foot baggage-car. About at the crossing I saw an automobile tire flying through the air. We might have been a few minutes late that day, I cannot say exactly. We [120] were going at the average rate of speed. I did not take the whistle as an ordinary crossing whistle. There were four real shrill whistles right together. I took it as an alarm whistle. I braced myself, grabbing hold of the side arm of the door.

Testimony of Norman E. Tompkins, for Defendant.

NORMAN E. TOMPKINS, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is Norman E. Tompkins. At present I am salesman for the LaSalle Extension University. In the fall of 1919 I was Great Northern agent at Monitor. At the time of the collision I was in Leavenworth. I went to Monitor at 2 A. M. the next morning, and about 8 o'clock that morning went over to the scene of the accident. No one had started to work on the cars on the industry track by the crossing at that time. I noticed the position of the cars standing on the industry track, just to the east of the highway. It stood just about six or eight feet of the east end of the crossing planks. It was a boxcar, and contained lumber for the Columbia Valley Lumber Company. I also noticed the position of the car just to the west of the crossing on the industry track. It stood about two feet east of the east end of the warehouse. It was a refrigerator-car. I had left Monitor at ten o'clock on the morning of the day of the accident. The cars I have referred to were in the same position at the time I left Monitor, and the same cars were standing there on my return that were there when I left Monitor. There had been no switching. I have never heard the river from the depot, and you cannot hear it from the crossing

(Testimony of Norman E. Tompkins.)

unless it is an unusually quiet day, with no other noises. Then you have to be listening for it. There had been no snow up to this time. Thanksgiving Day was a very pretty day, so much so that I drove to Leavenworth in a Ford [121] car without any curtains. There was no snow on the ground.

Cross-examination by Mr. MARTIN.

I measured the distance from the point where the automobile was struck to the point where the bodies landed. It was close to 120 feet.

Testimony of William F. Gunther, for Defendant.

WILLIAM F. GUNTHER, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is William F. Gunther. I am an electrician, employed by the Great Northern, and was so employed on November 27, 1919, at King Street Station, Seattle. I took the numbers of the cars in train 26 before it left Seattle on that trip. I made a record of it, and have that record with me. The equipment of that train was as follows:

Car No. 306, combination mail and baggage, steel car; No. 1651, baggage and express, wooden car; No. 3708 smoker, steel under frame; No. 4523, first class coach, steel car; No. 4109, first class coach, wooden car; No. 7111 diner, wooden car; No. 8240, sleeper, wooden car; No. 9020, observation car, wooden car.

Testimony of M. J. Dalton, for Defendant (Recalled).

M. J. DALTON, recalled as a witness on behalf of defendant, testified as follows:

Direct Examination by Mr. MATTHIAS.

The number of my engine was 1025.

Cross-examination by Mr. MARTIN.

We were about ten minutes late out of Cashmere that day.

Testimony of J. F. Rearden, for Defendant.

J. F. REARDEN, being called as a witness on behalf [122] of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is J. F. Rearden. At present I am employed by the Milwaukee Railway Company. For over eight years I was employed by the Public Service Commission of the State of Washington as a State Railway and Electrical Inspector. A part of my duties in that position was to ride trains in the State of Washington, for the purpose of seeing if engineers complied with the regulations in the giving of signals. We have a law in this state that requires that an engineer blow a whistle in the following manner for crossings: Two long and two short. This is to be done within a reasonable distance. The law stipulates a certain distance. In my judgment the speed has as much to do with it as the stipulated distance. Then it is also re-

(Testimony of J. F. Rearden.)

quired that the bell should be rung, and there are places where it is prohibitory to blow the whistle. In riding over this state I carried a little register on my finger, similar in operation to the register you use on your street cars, and would sit at the head of the train, possibly in the smoker, and check the number of highways that the engineer might pass over without blowing his whistle. I tried not to let the engineer know that I was on the train. If he saw me at the station I would say that I was not going out. I tried to avoid letting the information get out as to where and when I was going, or with whom I was going to ride. There was a penalty provided if engineers failed to blow their whistles at required points. If I found that an engineer had failed to blow his whistle, I would go down and talk with him and let him know that he had missed so many crossings. I would inform him that if he [123] continued in that practice I would have to report him. If he would promise to discontinue it I would forget it, but hold the matter in abeyance until such time as I caught him the second time. If I caught him the second time failing to blow his whistle, generally I would take it up with the superintendent of the division.

I have ridden behind Mr. Dalton a number of times, and have ridden with him on Train No. 26 down through Monitor. I have never had to call Dalton's attention to the fact that he had been missing signals. He is one of the men that I have never had to speak to. Mr. Dalton is a slow man. I

(Testimony of J. F. Rearde

consider him one of the slowest on the Spokane Division. On November 27th, 1919, I was in the employ of the Public Service Commission, and investigated for it the crossing at Monitor after the accident on that day. I did not find it a bad crossing for a grade crossing. All grade crossings are bad. I made a report to the Commission and did not recommend any improvement. I had been in the habit of recommending wigwag bells, but I don't consider them effective in preventing accidents. I consider them a menace to a crossing. They are not reliable. They are liable to give a false clear signal. A man driving to a crossing will invariably look to see if the wigwag is working, and if it is not in motion he will drive across. They are only a mechanical contraption, and not reliable. People will rely upon them and drive across without looking for the train. In investigating this accident I found that an automobile approaching from the direction Mr. Slocomb was approaching at the time this accident happened, at a speed of from 6 to 15 miles an hour, would have had time to stop if he had [124] looked in the direction from which the train was coming.

Cross-examination by Mr. MARTIN.

Electric crossing signals are not established on most all dangerous crossings in this state. I did not consider the Monitor crossing a dangerous one. If the view were cut off until a traveler got right onto the track it would be a dangerous crossing. I didn't know that in this case the view was cut

(Testimony of J. F. Rearden.)

off until you got right onto the track. I know all about this crossing. You couldn't see a train until after you got past the industry track, if cars were standing on it. I have known for nine years that they spotted cars on this industry track. I took no steps to have an electric signal put up, and after my investigation of this accident recommended that none be installed. There is an electric signal there now which was put up after this accident.

Certified copy of application for motor vehicle license by Mr. Slocomb offered and received in evidence as Defendant's Exhibit "Q." Whereupon the following proceedings were had:

Testimony of R. Franklin Hart, for Defendant.

R. FRANKLIN HART, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is R. Franklin Hart. I am superintendent of the Motor Vehicle Division of the State of Washington, employed in the office of Fred J. Dibble, Director of Licenses. I have been in the same office since January, 1919. We have in our office at Olympia a record for the entire State of Washington for the year 1919, of all applications [125] for motor vehicle licenses. I have examined the records between August 21, 1919, and November 27, 1919, to see whether during that time any license was issued to Cecil Slocomb. There was no license issued to Cecil Slocomb during those months. I have with me a copy of the license which was issued

(Testimony of R. Franklin Hart.)

on Chevrolet Automobile Roadster, 1919 Model, Bearing Factory No. 16016. Engine No. 31719 to Mr. William Slocomb, on his application of August 21, 1919. It is certified.

Certified copy of license admitted in evidence as Defendant's Exhibit "R."

Whereupon the witness continued to testify as follows upon direct examination by Mr. MATTHIAS.

The original license was sent to the owner.

Testimony of J. J. Dowling, for Defendant.

J. J. DOWLING, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

I am superintendent of motive power for the Great Northern Railway on lines west of Williston, North Dakota. Have been with that company for twenty-four years. The length of the engine and cars comprising train 26 on the day of the accident was as follows:

Engine 1025, Tender from the point of the pilot to the rear of the coupler, 70 feet 4 inches.

Baggage Car 306, 74 feet 4½ inches.

Baggage Car 1651, 68 feet 8½ inches.

Coach 3708, 70 feet, 6 inches.

Coach 4523, 81 feet, 7 inches.

Coach 4109, 70 feet, 6 inches.

Coach 7111, 70 feet, 1 inch. [126]

(Testimony of J. J. Dowling.)

Sleeper 8240, 80 feet 8 inches.

Observation car 9020, 82 feet 6½ inches.

The lengths of the cars given is length over all. The length of the entire train from the front of the engine to the rear of the coupler on the observation car was 670 feet .69 of an inch. The total weight of the engine and train was 1,331,300 pounds, without load.

Testimony of C. W. Sherman, for Defendant (Recalled.)

C. W. SHERMAN, recalled as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. MATTHIAS.

I am the same Mr. Sherman that was on the stand before. The grade on the main line track west of Monitor station is as follows: For 600 feet west of the station the grade is .21 per cent; for the next 1100 feet west of the station it is .35 per cent, and for the next 900 feet west it is level. East of the station it is level until you get out of the yards.

Cross-examination by Mr. MARTIN.

.21 per cent means that going west from the station at Monitor for the first 600 feet the track rises .21 of a foot in going a distance of 100 feet. If it rose one foot in 100 feet, we would call it a one per cent grade.

Testimony of J. F. Rearden, for Defendant (Recalled).

J. F. REARDEN, recalled as a witness in behalf of the defendant, testified as follows:

Direct Examination by Mr. MATTHIAS.

A train of eight cars, 670 feet long over all, going 35 miles per hour down a .21 of a one per cent grade, weighing 1,331,300 pounds, should be stopped with an emergency application of the air in between 800 and 850 feet. [127] It could not be stopped in 300 feet.

Cross-examination by Mr. MARTIN.

I do not think a street-car is heavier than a passenger-coach. I do not believe a street-car going 35 miles an hour can stop in half a block. A train can be stopped a little easier if it has eight coaches than if it has only one coach. If you have a solid train, you can stop quicker than you can if you only have a locomotive and one coach.

Testimony of George F. Beardsley, for Defendant.

GEORGE F. BEARDSLEY, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is George F. Beardsley. I am locomotive engineer for the Chicago, Milwaukee & St. Paul Railway, and have been such for thirty-two years. A train containing eight coaches, having a length over all of 670 feet, and weighing 1,331,300 pounds,

(Testimony of George F. Beardsley.)
going down a .21% grade at 35 miles an hour, on an application of the emergency-brakes should be stopped in approximately 800 feet. It could not be done in 300 feet.

Cross-examination by Mr. MARTIN.

Thirty-five miles an hour is the average speed for passenger trains in this country. It would take the train just described, going 65 miles an hour, 1500 to 1600 feet to stop on an application of the emergency-brakes. If the grade were level, the train might stop 50 feet shorter.

Testimony of J. J. Dowling, for Defendant (Recalled).

J. J. DOWLING, recalled as a witness on behalf of the defendant, testified as follows:

Of my forty years' experience in the railroad [128] business I was in active service as a locomotive engineer for eight years. I now have charge over the entire mechanical and car department. I think it would take the train which you have just described to Mr. Rearden and Mr. Beardsley 800 to 825 feet to stop on an application of the emergency-brakes. I have never known of it being done in 300 feet. I have known Mr. Dalton twenty-four years. I practically brought him up. I have ridden with him a number of times. I have never known of any complaints against him. I have never seen any careless actions on his part. I have never received complaints from the public or supervisory officials.

(Testimony of J. J. Dowling.)

Cross-examination by Mr. MARTIN.

I do not know anything about Mr. Dalton killing other people. At the present time I have had jurisdiction over Mr. Dalton for two years and three months, and prior to that for seventeen years. It is not a fact that more claims have been sent in on account of Mr. Dalton than on account of any other engineer on the road. I am not in the Claim Department, and know nothing about the settlement of claims.

Whereupon the following proceedings were had:

Testimony of J. W. Chatterton, for Defendant.

J. W. CHATTERTON was called as a witness on behalf of the defendant and duly sworn. Whereupon Mr. Matthias stated in open court that he would waive his direct examination and allow Mr. Martin to examine Mr. Chatterton without any previous direct examination.

Whereupon the witness testified as follows upon examination by Mr. Martin:

I am claim agent for the Great Northern Railway [129] and have held that position since 1913. I collect evidence from witnesses. My business is to make a fair investigation of the case and get the facts and the truth of the case, in order to submit them to my superior in St. Paul. I was at the coroner's inquest conducted in regard to this accident at Wenatchee. When I went to Monitor I made an investigation of the case. I took the statements of witnesses as they were given to me, had

(Testimony of J. W. Chatterton.)

them read and sign them and write on them "I have read this statement and find it correct." In preparing the statements I took down what they told me. I took statements from every witness I could see in this case. I was trying to find out whether we owed Mrs. Slocomb any money. I don't know what Jack Dalton's reputation is in the Wenatchee Valley. I don't know of any people he has killed, except those concerned in this case. There was no man killed west of Monitor the year before. There has been no man killed there since 1915 to my knowledge. I cannot testify to what happened before that time, as I was not on this division. I was present when defendant's pictures were taken and directed the positions of the camera. I attempted to get all the physical conditions that existed at the crossing in the picture. I had him take those pictures the same way as all other pictures are taken. We get the best pictures we can.

Redirect Examination by Mr. MATTHIAS.

Dalton has not struck any other automobile. As to stock I cannot testify without my record. The fast mail trains 27 and 28 kill more stock than any other trains on the division.

Recross-examination by Mr. MARTIN.

The automobile truck shown in Plaintiff's Exhibit [130] 4 was struck at that crossing some time during the last year. I cannot testify as to the number of the train that struck it, but it was not Dalton's.

Testimony of G. O. Lungren, for Defendant.

G. O. LUNGREN was thereupon called as a witness on behalf of the defendant, and being duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is G. O. Lungren. I am a baker by trade and now employed by the Puget Sound Milling Company. On the day of this accident I was employed on train 26 as news agent. I was in the forward end of the smoker, the third car from the engine. The first whistle I heard was one long blast,—a station whistle. I should judge we were about a mile out from Monitor when it was given. It was just before we got to the curve west of Monitor. The next whistle I heard was right on the curve. It was two long and two short blasts. It was a crossing whistle. When the train was almost to the Monitor crossing I heard a congestion of whistles. They were so close together and so fast it was hard to determine just what they were. They were shrill and loud. A short time after that the air was applied. It was such a hard application that I was almost thrown out of my seat. I think the train was going at an average speed as it rounded the curve,—between 30 and 35 miles an hour. There was no snow on the ground. I noticed the dust at the crossing. After the train stopped I got off and went back to where the bodies were. I crawled up over the back end of the observation car to get a blanket. The back end of the observation

(Testimony of G. O. Lungren.)

car, after the train had come to a stop, was about 10 feet east of the crossing.

Cross-examination by Mr. MARTIN. [131]

It is not a fact that the train ran 470 feet beyond the crossing before it came to a stop and immediately backed up so that the rear of the train would be 10 or 15 feet from the crossing.

Testimony of F. J. Bauer, for Defendant.

F. J. BAUER, being called as a witness on behalf of the defendant and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is F. J. Bauer. I am Master Mechanic on the Spokane Division of the Great Northern Railroad and have been so employed for about six years. I have been with the Great Northern eighteen years and in the railroad business thirty-four years. I have occasion to ride in the cabs of engines and watch the engineers in the management of their engines. In my opinion it would take the train which you have described to the other witnesses, going at 35 miles an hour, under the conditions mentioned, approximately 800 feet to stop on an application of the emergency-brakes.

Cross-examination by Mr. MARTIN.

I am not a railroad engineer, but have run a locomotive in and out of the roundhouse.

(Testimony of D. A. Leahy.)

Redirect Examination by Mr. MATTHIAS.

I make a trip on this division once a week and in every case ride in the engine a part of the way.

Testimony of D. A. Leahy, for Defendant.

D. A. LEAHY, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is D. A. Leahy. I am a train-dispatcher for the Great Northern Railway and on November 27th, 1919, [132] was a train-dispatcher for that company, working between Leavenworth and Wilson Creek, Washington, in which district Monitor is located. I have been a train-dispatcher eighteen years and with the Great Northern nine years. It is the duty of the train-dispatcher to have a train sheet, on which is entered each train that is on the division, showing the engine number and of what the train consists. We keep a record of the numbers of all the cars in the passenger trains, and in addition to that we keep a record of when these trains arrive and depart from each station, and these records are placed on the train sheet immediately upon receipt of same from the operator. This is done so that we can at all times know the location of the trains on the division.

Orders which are to be delivered to the trains are given by us to the operators at the station. A train enters our division at Leavenworth, and consequently that would be the first station on our divi-

(Testimony of D. A. Leahy.)

sion where that train would receive orders. We also give them to intermediate stations before the train gets there. This is the way to tell when a train gets the orders. Our orders are all numbered and the operator, before he clears the train, calls up the dispatcher and says: "Clear No. 26 with orders 1, 2 and 3." The dispatcher is supposed to know that is all the orders he has for that place affecting that train, and if the operator gives the correct numbers the dispatcher will give his O. K., stating the time. The train cannot move from that station until he has this clearance card, with the time on it, that the dispatcher has O. K.'d the train. This gives the train crews assurance that they have received all the orders concerning them before leaving. [133]

I was on duty on November 27th, 1919, and have my train sheet for that day with me. I have here the orders that were given to train 26 on that date. This is a copy of the clearance card and the train orders that were delivered to train 26 November 27th, 1919. An operator makes these orders in manifold, keeping the last copy as the office copy, and these are the office records of the orders that were delivered to that train on that date. This is the train order book, in which the train-dispatcher records all orders issued. On November 27th, 1919, order No. 86 was issued to train No. 26 at Leavenworth, reading as follows: "No. 1, engine 1021, meet No. 26, engine 1025, at Cashmere." That order was given to train No. 1, which was going west, at Wenatchee. It was given to No. 26, going east, at

(Testimony of D. A. Leahy.)

Leavenworth. That order provided a meet between No. 1 and No. 26 at Cashmere. As a safety precaution we used what is called a middle order. The same order that was given to both of these trains was put out to the operator at Cashmere, to be handed to the first train concerned in the order arriving at Cashmere on that day. No. 26 arrived first, and this middle order was delivered to that train. Our train sheet shows that on that date No. 26 arrived at Cashmere at 3:14. It was one minute late into Cashmere. The switch on which No. 26 met No. 1 is east of the depot at Cashmere.

No. 26 also received at Leavenworth what is known as a slow order, No. 804, reading as follows: "Reduce speed to five miles per hour over new culvert, three-quarters of a mile east of east switch at Peshastin." That is the first station east of Leavenworth. Those were the only two orders received by No. 26. The next station east after No. 26 left Cashmere is Monitor. That is the point where the accident [134] happened. We did not have an operator at Monitor. The next station at which an operator was kept was Wenatchee. No. 26 arrived at Wenatchee at four o'clock P. M. It was one minute late at Cashmere and the regular time for No. 26 to leave Wenatchee, according to the time card is 3:38, whereas on this date it arrived at four P. M. The time card speed for No. 26 over the division from Leavenworth to Wilson Creek, the average speed provided by the time card for that train over the division, was 31.5 miles per hour.

(Testimony of D. A. Leahy.)

The time card had a provision restricting the speed for locomotive engineers between Leavenworth and Wenatchee, which read as follows: "Maximum rate of speed for passenger trains Wenatchee to Leavenworth 35 miles per hour." This provision was intended to apply to trains going in both directions.

Cross-examination by Mr. MARTIN.

On the afternoon of November 27th, 1919, No. 1 was due to leave Wenatchee, according to the time card, at 1:17 P. M. On its time-card schedule it was due to arrive at Cashmere at 1:40 P. M. It arrived at Cashmere at 3:27 P. M. There were no slow orders issued by the company for trains passing through Monitor except the general slow order already mentioned of 35 miles an hour for the entire distance. Wilson Creek is 75.28 miles from Wenatchee.

Redirect Examination by Mr. MATTHIAS.

The distance from Cashmere to Wenatchee is 11 miles; Wenatchee to Quincy 35.51 miles; Quincy to Wilson Creek 39.37 miles.

Cross-examination by Mr. MARTIN.

There is a notation on the train sheet that No. 26 struck an automobile at Monitor, auto occupied by three men. [135] Men taken to Wenatchee. Two died on way to Wenatchee. I have no notation showing the time of the accident.

Testimony of William Carswell, for Defendant.

WILLIAM CARSWELL, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is William Carswell. I am trainmaster for the Great Northern Railway. I have been a railroad man since 1883, and with the Great Northern twenty-three years. The extreme east end of the switch at Cashmere is approximately 4,500 feet east of the Cashmere depot—toward Monitor and Spokane.

Testimony of W. P. Skeffington, for Defendant.

W. P. SKEFFINGTON, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is W. P. Skeffington. I am a fireman for the Great Northern Railroad. Have been so employed for nine years. I was firing for Mr. Dalton on the day this accident happened. At the time we met No. 1 on the east switch at Cashmere on that day we were just in the clear of the main line at the extreme east end of the passing track. As we went into Monitor on that day we were going between 30 and 35 miles an hour. We were not going any slower or faster than usual. As we rounded the curve into Monitor the regular crossing whistle, or warning whistle, was blown. I call a crossing

(Testimony of W. P. Skeffington.)

whistle a warning whistle because it is meant for a warning whistle at the crossing. Our engine was about the middle of the curve just west of Monitor when the whistle was given. It was two long and two short blasts. When we were about 300 feet from the [136] crossing at Monitor there was a real shrill whistle. It was two or three blasts—just as one given by anyone that is tense or alert. The bell was ringing all the way from Cashmere. It is operated automatically by air. The first I knew that anything was wrong was when the engineer partly rose up and blew the whistle. It was unusual for him to jump up and grab the whistle at that place. He was standing with his hand on the brake valve and blowing the whistle—kind of half sitting and half standing. The brakes were applied about the same time the whistle was blowing. I was on the left side of the cab. I could not see the automobile when the engineer saw it because it came from the right-hand side. When we were about 75 or 100 feet from the crossing I saw the front end of it just as it came over the track. It seemed to be stopped. When the air was applied it felt like the lever was pulled back to the full emergency position.

Cross-examination by Mr. MARTIN.

When the engineer was near the semaphores at Monitor he whistled a real long whistle. On the curve he gave two long and two short whistles. He did not give a real long one. We struck this automobile about 3:30 in the afternoon. It is customary to give only one crossing whistle at a crossing. The

(Testimony of W. P. Skeffington.)

next whistles that were blown were given when we were right up near the crossing at Monitor. The whistle given then was a succession of whistles. I don't remember how many. It was a startling whistle. The reason I said he gave two long and two short whistles at the curve is that that is the usual crossing whistle. I remember he gave two long and two short at that point—I am positive of it. I was sitting on the left-hand side and the automobile had to cross on to my side before I [137] could see it. When I first saw it I could only see the front end of it. In order to see the center of an object it has to be about 200 feet in front of my engine . Mr. Dalton rather jumped up from a sitting position and as he got up quickly blew the whistle, and that is what I referred to as strange.

Redirect Examination by Mr. MATTHIAS.

I did not look at my watch after the accident and do not know the exact time it happened. If an automobile is on the track within 30 feet of the front of my engine I can see a part of it. In this case all I saw of the automobile was the hood.

WHEREUPON it was stipulated between respective counsel that Plaintiff's Exhibits 8 and 12, being photographs, be admitted in evidence, and the same were thereupon admitted.

Testimony of D. A. Leahy, for Defendant (Recalled —Cross-examination).

D. A. LEAHY, a witness for defendant, being recalled for further cross-examination by the plaintiff, testified as follows:

Cross-examination by Mr. MARTIN.

I have the train sheet for November 27th. It shows the arrival and departure of all trains on the division on that day at all points at which operators were on duty. The next freight train that passed Cashmere after the departure of Train 26 on that day was Extra 1819 east, which passed Cashmere at 4:40 P. M., arriving at Wenatchee at 5:10 P. M. The next train was Extra 1150 east, leaving Cashmere at 10:35 P. M., arriving at Wenatchee 11:35 P. M. After 26 passed the next train going west Extra 1811, which left Wenatchee at 6:45 P. M. and arrived Cashmere 7:35 P. M. The next train was 693, engine [138] 706 that left Wenatchee 7:50 P. M. and arrived Cashmere 8:35 P. M. The next train was Extra 1817 west, left Wenatchee 11:50 P. M. and arrived Cashmere 12:31 A. M. on the 28th. I cannot say whether those trains set in or picked up loaded cars at Monitor. I have no record of the trains passing Monitor. With one exception these were all through trains, and did no local business. 693 was the only local train. That left Wenatchee at 7:50 P. M. and arrived at Cashmere depot 8:35 P. M. From the time shown it would indicate that the train made no stop at Monitor. This being Thanksgiving Day the agent at

(Testimony of D. A. Leahy.)

Monitor was excused for the holiday. I have nothing that shows that this train did not stop at Monitor, except that it consumed 45 minutes between Wenatchee and Cashmere, which is just about running time for a train of that size to travel from Wenatchee to Cashmere, without a stop. The train consisted of ten loads and six empties, besides engine and caboose. It was a small train and in the ordinary course of business if there were any cars to be set or moved at Monitor and the crew was instructed to attend to it, this train would do that work. I don't know whether this train set in any loads or picked up any empties at Monitor on that day.

Whereupon the train sheet was offered in evidence by Mr. Martin, and admitted by the Court as Plaintiff's Exhibit 19 on the stipulation that whichever side wanted the train sheet kept in the record could supply a copy, and that after the trial it could be withdrawn.

The regular time-card in force at the time was [139] then offered in evidence by Mr. Martin and admitted by the Court, as Plaintiff's Exhibit 20, on the stipulation that it remain during the trial, and that the defendant may on three days' notice withdraw it, the plaintiff having three days within which to supply a copy.

Whereupon the witness further testified on cross-examination by Mr. Martin:

This was the regular time-card in force at that time, showing the time on all regular trains.

Testimony of J. A. Nelson, for Defendant (Recalled).

J. A. NELSON, recalled as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. MATTHIAS.

After this accident I took the number of the license on Mr. Slocomb's automobile. I put it down on a report, signed the report and I now have it with me. The automobile bore a Washington license number. It was marked "Wn. 172990."

Testimony of M. J. Kane, for Defendant.

M. J. KANE, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is M. J. Kane. I am engaged in automobile repair business. I am familiar with the 1919 model of the Chevrolet automobile. I was employed by the Chevrolet factory in Flint, Michigan and New York, and later in business for myself in Seattle. I drive a Chevrolet. I am familiar with the Chevrolet roadster, weighing 1600 pounds, of the 1919 model. I have been present in court during the trial and heard the testimony that has been given as to condition of the road and railroad crossing at Monitor. [140] A Chevrolet roadster of the model and weight mentioned, going over this road, as shown in Defendant's Exhibit "K," at a speed of six miles an hour, the car in first class condition, with brakes in good order, and the car in

(Testimony of M. J. Kane.)

good mechanical working order, with good tires, could be stopped within two or three feet. It could be turned instantly at a right angle. It would answer the wheel right away. If the same car were going ten miles an hour, it could be stopped within six to nine feet. It could be turned at a right angle almost instantly. The fenders might swing out a little, but the forward travel would be very slight. The same car going at 15 miles an hour could be stopped within 16 to 18 feet. If turned at a right angle the travel of the car forward would be very slight. It would answer the wheel almost immediately. The length of the seat cushion in this model Chevrolet is 39 inches. Three people sitting in it would have that much space to occupy. Three people cannot sit in the seat of that car. Some one has to sit on the upholstering on the side of the body, and the driver is cramped. He cannot get his feet directly on the controls. This car was left-hand drive. If three people were in the seat the feet of the other two passengers would be crowded toward the center of the car, due to the tapering of the body. In this model Chevrolet the service-brake, commonly called the foot-brake, is attached to the same pedal as the clutch. That is the left pedal. The foot-brake and clutch are on the left pedal. The emergency-brake is also a foot-brake with the ratchet attachment to lock it. It is operated by the right foot. The accelerator is directly underneath the emergency-brake and to the right. The accelerator is the method of controlling the

(Testimony of M. J. Kane.)

speed of the motor. [141] It gives the motor more gasoline, and the more gasoline you give it, the faster it goes. There are no hand-brakes on the Chevrolet.

Cross-examination by Mr. MARTIN.

From the tip of the front fender to the tip of the rear fender the Chevrolet is 11 feet 5½ inches long. The width from fender to fender is 5 feet 4½ inches.

Testimony of William S. Herbert, for Defendant.

WILLIAM S. HERBERT, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is William S. Herbert. I am in the automobile repair business. For a period of three years I was with the Local Agent of the Chevrolet, the Dulmage Motor Company, in the capacity of workman, foreman and service superintendent. At that time they handled the Chevrolet exclusively. In my capacity as service superintendent I have driven at least 150 cars of this type. This model Chevrolet roadster, being 1919 model, weighing 1600 pounds, has a length over all of 11 feet 5½ inches. Width over all, fender to fender in the rear is 5 feet 4½ inches; width over all in the front, hub to hub, is 5 feet 6 inches. The inside measurement of the seat is 39 inches. The width from the back to the front of the seat 18 inches. The distance from

(Testimony of William S. Herbert.)

the eyes of the driver sitting at the wheel to a point even with the front of the car is 6 feet 8 inches. This is the measurement on a horizontal line. I heard the question put to the witness Kane as to the distance in which the automobile described could be stopped going at various speeds. In my opinion going at 5 or 6 miles an hour, under the conditions mentioned, [142] a Chevrolet Roadster of this model could be stopped in two or three feet; at 10 miles an hour within six or eight feet; at 15 miles an hour 12 to 16 feet. I have ridden with three people in the seat of Chevrolet cars. There were two parties besides myself, making three in all, one a little girl, four years of age. It was crowded, and in fact impossible for me to have correct control with the little girl between us.

Cross-examination by Mr. MARTIN.

I cannot say how quickly the automobile could be stopped if there was snow on the ground. It would be impossible to say. The 39 inches measurement on the inside of the seat cushions is the distance between the seat arm. The upholstery on either side of the seat, will, of course, give in a little, depending upon the time the car has been used. The additional width gained by compressing the cushions due to such use would not be over two inches. I would not say that was 41 inches. Three people could sit comfortably in the seat. I would say it would take at least six or eight inches more for three grown people to sit in those seats. It depends on how large they are.

(Testimony of Mrs. W. B. Bird.)

Redirect Examination by Mr. MATTHIAS.

If one of the parties weighed 205 pounds, the third party would have to sit on another's lap, or on the door.

Testimony of Mrs. W. B. Bird, for Defendant.

MRS. W. B. BIRD, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is Mrs. W. B. Bird. On Thanksgiving, 1919, we were living at Monitor, Washington. My husband and I worked [143] for the Clark Oliver Apple Company, and we lived in a tent near the Great Northern railroad track. It was the last tent up the track west toward Cashmere. Our tent was just a short distance east of the semaphores,—probably half a city block. I am not positive about the distance, but it was very short. Looking at Defendant's Exhibit No. 1, our tent was the last little tent shown in the photograph.

I heard Train 26 approach Monitor on that day. The first I heard was one whistle. The train was not in sight. Then I heard two whistles, and saw the train. At that time the train was opposite my tent. I don't recall any other whistles after that, because I didn't know there was an accident. The train had not yet passed my tent when I heard the last whistle. It was just at my tent. I was accustomed to see train 26 go by. I worked right there in the

(Testimony of Mrs. W. B. Bird.)

warehouse, and we would see it when it passed. I have noticed that train always whistled and then it came around the curve. There are generally one or two whistles. I didn't notice any difference between the speed of the train on this and other days. The day of the accident was a very beautiful day. There was no snow on the ground.

Cross-examination by Mr. MARTIN.

We had just had Thanksgiving dinner. I was in the tent finishing my dishes when I heard the first long whistle. I stepped out of my door to empty my dish water when the train passed by and blew two long whistles. It might have been two short ones for all I know, but I remember two whistles anyway,—very loud. As it was passing my place it blew. As I walked to my door and emptied my water the train passed. There were two long whistles. I remember that very distinctly, as they were very loud at [144] the time. They sounded particularly loud to me, anyway. I don't know whether they were alarm whistles. They were louder than the first whistle, because it was quite a distance away. The first whistle was a long whistle around the curve. The train was not in sight.

Testimony of W. B. Bird, for Defendant.

W. B. BIRD, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is W. B. Bird. I am the husband of

(Testimony of W. B. Bird.)

the lady who was just on the stand. On November 27, 1919, we lived in a tent about 25 feet from the Great Northern right of way, at the place my wife has just described. As I remember the whistle before the train got to the curve, it was two long and two short. I couldn't say where the train was because I was inside the tent. After that I heard two shrill whistles, and it is distinct in my memory because I said to Mrs. Bird that he was sure blowing his whistle that day. It seemed to me to be unusual. On previous occasions I had just heard two long and two short whistles as the train came around the curve. On this occasion he blew the second time. That was what attracted my attention. I didn't know until three or four hours later that an accident had occurred. I didn't see the train on this day. On other days while working at Monitor I saw train 26 go by nearly every day. Its usual speed was about 35 miles an hour. I have been a commercial traveler for six years and driven an automobile during that time over the States of Oregon, California and Washington. I have a fairly good conception of speeds. The day was very clear and rather warm. Two other young men and myself sat out in [145] front of the tent and talked all afternoon. As I remember, the sun was shining. There was no snow on the ground. Our tent stood 50 feet from the river, and I do not recall ever having heard it make a noise, unless it was at night and very still, when I could just hear it.

(Testimony of W. B. Bird.)

Cross-examination by Mr. MARTIN.

There is a small rapid in the river west of Monitor. This was about 200 yards west of where our tent was located. It was caused by a small island around which the river branched.

Redirect Examination by Mr. MATTHIAS.

The bell was ringing as the train passed.

Testimony of J. P. Nabours, for Defendant.

J. P. NABOURS, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

My name is J. P. Nabours. I am merchant tailor by trade. On November 27th, 1919, I was at Monitor, Washington and working for the Columbia Valley Lumber Company, of which concern Mr. Young was manager. About the time of this accident I was engaged in hauling wood. I was working behind the building marked "shed" on the map, Defendant's Exhibit "D." We had a car standing on the industry track between the shed and the warehouse, as shown on the map. The wood was being thrown off the car at this point, and we were piling it up at the point mentioned. The first I knew there was a train coming I heard it quite a ways down the track. I heard the roar of the train. The next thing I heard was the whistle. I don't know whether it whistled once or twice at that particular point. As the train came on I heard the bell. Then I heard more whistles. Not being familiar with signals, I didn't notice how many

(Testimony of J. P. Nabours.)

whistles [146] there were. It was a regular train whistle, and I didn't observe as to whether it was extra loud or not. Then I heard more whistles. It was a combination of whistles that I had never heard before at that crossing. I didn't know what they meant at the time. I just knew that it was a whistle that had not been whistled there before that I had heard. It was shrill. The day was clear. There was no snow on the ground. After the accident I went up to the crossing. The train was still there. The cars standing near the crossing on the industry track just to the east of the highway was one of our cars with lumber in it. If I am not mistaken the west end of the car was 20 to 30 feet east of the crossing. I wouldn't say exactly, because I didn't measure. I noticed the car that stood on the industry track to the west of the crossing. The east end of that car was standing in the vicinity of the telephone post to the west of the crossing,—probably 3 feet one way or the other of that post. In my work at Monitor I went back and forth across this crossing three or four times a day. It was a good crossing. I didn't see any crossing planks out of it. I didn't see anything wrong with the road between the tracks. I was there on the 29th, when the photographs were taken for the railroad. It looked to me that the cars were in the same position when the photographs were taken that they were in immediately after the accident. I didn't see the automobile until after the accident.

(Testimony of J. P. Nabours.)

I didn't see the train at all. I only saw the smoke over the tops of the buildings.

Cross-examination by Mr. MARTIN.

When the train stopped the engineer was about [147] opposite where I was working,—perhaps about two feet past me. I was down at the station when the train was backed up. I didn't make any tape measurements as to the distance of the freight-cars from the crossing. My attention was not called to the dangerous condition of the crossing at that time. It did not appear to me that there was anything wrong with the spotting of the cars. Some time during that day I helped pull lumber out of the first car to the east of the crossing. We took our lumber out with a truck. We drove across the crossing over the industry track and headed up and then back down by the side of the car, so we would be headed out when we were loaded. We had our trucks in the roadway between the industry track and the passing track.

Testimony of George Davis, for Defendant.

GEORGE DAVIS, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is George Davis. I live at Monitor, where I work on a farm. I was at Monitor on Thanksgiving Day, 1919. I was just going inside the restaurant. I think I had my hand on the door, when I heard the train whistle. I think it was the

(Testimony of George Davis.)

whistle that they give for the station. I don't know where the train was then, because I didn't see it. It was a loud whistle. The next thing I heard was this stock whistle. It was a shrill whistle. I don't remember how many blasts. The bell was ringing loud. I didn't see the train until after it was near the depot. I didn't see the train at all before the accident. Somebody said that a car was hit, and we all ran over to see what it was. I didn't see the accident. [148]

Cross-examination by Mr. MARTIN.

I do not recall any other noises or sounds around there that day. During high water the river makes quite a lot of noise. I don't know how high the river was at that time. The white cross on the photograph, Plaintiff's Exhibit 14, does not represent where the end of the train was when it stopped. The train stopped about 10 or 15 feet from the crossing. When I heard that a car had been hit, I went over to see who was in it. There was no snow on the ground.

Testimony of Chester L. Bills, for Defendant.

CHESTER L. BILLS, being called as a witness on behalf of the defendant, and duly sworn, testified as follows;

Direct Examination by Mr. MATTHIAS.

My name is Chester L. Bills. I live at Monitor, and was there on Thanksgiving Day, 1919, when this accident happened. I was in Flaherty's res-

(Testimony of Chester L. Bills.)

taurant when the train approached the crossing. The restaurant is located to the west and north of the crossing. I saw the train just as it hit the automobile. The automobile started rolling over ahead of the engine. It raised a cloud of dust. Then I saw the car drop at the west end of the station platform. There is a drop of about two feet from the railroad track at that point. It was a clear day. There was no snow on the ground. I have trouble with my hearing, and didn't pay any attention to the signals.

Cross-examination by Mr. MARTIN.

I saw the automobile roll over in front of the engine a couple of times to my recollection. Looking at Plaintiff's Exhibit No. 4, the automobile was lying about where the figure "4" is. I cannot judge very well by this picture, because there was no snow on the ground. I went [149] with the bodies to Wenatchee.

CHESTER L. BILLS, recalled as a witness on behalf of the defendant, testified as follows:

I knew Glen Long and had been acquainted with him since 1916. I saw him weighed on the scales in April, 1917. I weighed him myself and he weighed 205 pounds. At that time he was about twenty years old. He was older and had filled out a little bit more at the time of the accident.

Testimony of R. T. Houston, for Defendant.

R. T. HOUSTON, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is R. T. Houston. I live in Tekamah, Nebraska, and came here at defendant's request to testify. I was in Monitor on November 27, 1919, employed by the Columbia Valley Lumber Company. At the time of the accident I was working with Jack Young. Thanksgiving Day was bright and sunshiny. I ate my Thanksgiving dinner on the ground in the lumber-yard, and remember that there was no snow on the ground, and that it was not very cold. I was working about the car standing immediately to the east of the highway on the industry track. It was a boxcar, loaded with lumber. We were engaged in loading the lumber on to a truck, and hauling it over to the lumber yard. I do not know exactly how far the west end of the boxcar was east of the crossing, but it was probably 10 or 20 feet. The crossing did not look anything like it does in the photograph, Defendant's Exhibit 5. There was no such a narrow space between the cars. Just before the train came along Mr. Young and I had loaded the truck with lumber from the south door of the car. I was driving the truck, and we had started to go on to a little road just off the main road when [150] the left wheel of the truck went into the ditch, and we lost part of our

(Testimony of R. T. Houston.)

load. We were picking up this lumber and rearranging our load when I heard the train whistle. We were about 20 feet south of the industry track, and about 80 feet from the main line. We were just at the left of the highway headed south on a sort of a private road, at the point where the private road leaves the main road. I heard the train whistle, but don't know how many blasts of the whistle were given. I looked at my watch, but don't remember what time it was. I made some remark about the whistle, turned around and heard the train whistle again. It was louder than the first whistle, and I could hear it very distinctly, but I don't remember how many blasts were given. At this point I saw the automobile. It was 100 or 150 feet up the road, south and west of me, coming toward me. The automobile was running about 15 miles an hour. It kept coming towards us, and I stepped out from the road, held up my hand and hollered at them when they were just about even with me. I don't remember what I said, but the reason I did this was that I heard the train whistle and knew that it could not be many feet away, and that there was danger of an accident. The occupants of the automobile did not give any indication of seeing or hearing me. I don't think there was any reduction in the speed of the automobile. They went right on by me. The curtains were down on the side of the auto next to me. Then I heard the crash when the train hit the automobile. I also heard more whistles, but apparently to me they were given at

(Testimony of R. T. Houston.)

the same time that the train hit the machine. It was a very shrill and loud whistle. In my opinion the train was running about 30 miles an hour. I didn't see any reduction in the speed of the automobile at all. [151]

Cross-examination by Mr. MARTIN.

I didn't say to Jack Young at the time that the train was going 65 miles an hour. It was five, ten or fifteen minutes before I heard the train whistle that we tipped over our load. I came down to Monitor that morning from Cashmere. I left that evening and was not in Monitor again. I am in the livestock business now at Tekamah, Nebraska. When I came to Monitor I had been in Cashmere two or three weeks. I was working for the Columbia Valley Lumber Company. I went to Cashmere from Seattle. I had been in Seattle about a week. I came out here to get a job. At that time I was in the lumber business. After the accident I remained in Cashmere for about two months. I can't tell you how many blasts of the whistle I heard when the whistle blew the first time. I cannot tell where the train was when I heard the first whistle. It seemed to me that the last whistle was given just as the train struck the automobile. At that time I was looking toward the train. Just as the train hit the automobile it was out of my sight, because I was on the south side and the train was between us. I didn't hear the bodies hit the station building nor see anything flying through the air. I could hear the automobile roll over in front of the

(Testimony of R. T. Houston.)

engine. It sounded like a lot of tin rolling along the ground,—like a big ball of tin. I remember hearing the whistles, but I can't tell you how they were given,—whether one long and two short or three short, or what.

Redirect Examination by Mr. MATTHIAS.

My father lives in Tekamah, Nebraska, and I am in business with him. [152]

Testimony of J. W. Young, for Defendant.

J. W. YOUNG, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is J. W. Young. I am manager of the Columbia Valley Lumber Company at Wenatchee. I was in Monitor November 27, 1919, and was working with Mr. Houston in unloading lumber from a car. I had charge of the yard at Monitor at that time. We were putting in a new lumber-yard there. Our head offices were in Seattle and we went down to Monitor from Cashmere. I was the employer immediately over Houston, and took him to Monitor with me on Thanksgiving Day. Before and after Thanksgiving he was working for me at Cashmere. He was working for me on this holiday as an accommodation. I saw the collision between Mr. Slocomb's automobile and the train. Houston and I were working on the car just east of the crossing. We didn't finish unloading the lumber from that

(Testimony of J. W. Young.)

car on Thanksgiving Day, and I saw the car again the next day. On the day of the accident the west end of the car standing to the east of the crossing was six, eight or ten feet east of the crossing. The next day after the accident it was in the same place. I saw it about eight o'clock the next morning. At the time of the accident the car that stood to the west of the highway crossing, the east end of that car was about even with the telephone post. Referring to Plaintiff's Exhibit 5, the car on the east in that picture looks something similar, but the car on the west was back by the telephone post. The bulkhead that is shown in the photograph was back of the telephone post also. As to the crossing I don't recall any planks being out, and it seems to me that it was just an ordinary crossing. Just before we heard the train we left our hind wheel on our truck [153] had gone in the ditch, and we lost our load of lumber. We were 20 or 25 feet south of the industry track. My attention was first called to the train by the whistle. We were blocked by the warehouse, so that I couldn't see the train. I don't remember how many blasts of the whistle were given, but I heard the whistle plainly. The warehouse seemed to echo the roar of the train. I heard the roar after I heard the whistle. It was distinct. Of course, by that time I was watching for the train. I don't remember any more whistles before I saw the automobile. Mr. Houston took several quick steps away from the truck towards the automobile. He hollered something. I don't

(Testimony of J. W. Young.)

remember what it was now. I stepped across the track. I saw the smoke over the warehouse and I stepped around to see if there was a train in sight. I saw the automobile just at the west end of the warehouse on the west of the crossing, and then I stepped across the industrial track to see where the train was. The train came into my view just as I went across the industry track. The automobile was going between 10 and 15 miles an hour. I didn't notice any reduction in the automobile's speed. I don't remember any more whistles. I got excited. I noticed the automobile just as it crossed the track. It looked like it stopped just before the train hit it, with the rear wheels just over the south rail of the main line. At that time the train was right on it. It was a clear day, and I don't think there was any snow.

Cross-examination by Mr. MARTIN.

The train was running fast. I wouldn't know for sure about the speed. I don't think it was running 65 miles an hour. I would think 40 or 45 miles an hour. We had eighteen cars on the industry track that day. Altogether [154] there must have been thirty cars on that track. It was pretty crowded. There were cars above the crossing to the west. The woodyard was about 700 feet down the track. It was just east of the coal bunkers, next to the shed. Plaintiff's map approximately shows the location of the warehouses with reference to the crossing and the Monitor depot. We had 16 men, 4 wagons and 4 trucks working around

(Testimony of J. W. Young.)

there that day. We were engaged in unloading lumber at different places along that track, both east and west of the crossing, and had our trucks standing between the industry and passing track. There were people working in most all of the warehouses that day.

Testimony of A. J. Flaherty, for Defendant.

A. J. FLAHERTY, being called as a witness on behalf of the defendant, and duly sworn, testified as follows:

Direct Examination by Mr. MATTHIAS.

My name is A. J. Flaherty. I now live in San Diego, California, and came here as a witness at defendant's request. My father lives at Monitor, Washington, and I was there on November 27th, 1919. At that time I was living in Monitor. Just before this accident happened I was inside of the restaurant. My attention was first directed to the train when it whistled. I was inside the door, and I looked out to see whether it was a passenger train or freight train, as I was expecting some mail. Immediately after it whistled I looked out. I saw the engine and mail car and a portion of the baggage-car as the train was rounding the curve west of Monitor. I mean the curve up by the semaphores. Referring to Defendant's Exhibit "I," the building in the center of the photograph where the two pictures are joined is the restaurant where I was at the time. [155] You can see the sema-

(Testimony of A. J. Flaherty.)

phores in the picture near the turn in the track. It was near those that I saw the train approaching. Then I started toward the postoffice. I happened to glance up as the train was coming down the track. The train was perhaps one-half of the distance from the curve to the crossing at that time. I could see the train coming and hear the roar of it. I continued walking and just happened to glance up. My eyes left the train for a moment, and I believe I was looking toward the depot—towards the east. My attention was next attracted by a series of whistles. I don't know whether it was two or three whistles. It seemed to be sort of interwoven—a shrill, shrieky whistle. I looked up towards the crossing and I noticed the automobile coming across. I don't know exactly what its speed was, but it looked to me about five miles or more per hour that the automobile was making. It was somewhere between the industry track and the passing track, moving at about that rate of speed. It may have been more than five miles an hour. I don't think it was any less. The automobile was crossing diagonally across the crossing. I saw the train hit the automobile. I don't remember about the bell on the train. Shortly after the last shrill and shrieky whistle was blown there was a grinding of the brakes on the train. The automobile moved over on the crossing and it seemed to stall just as it got about the center of the track, as if the gas were not feeding properly. It hesitated a moment and was just picking up speed as the pilot

(Testimony of A. J. Flaherty.)

of the engine struck the car. It struck about the center of the automobile and moved the car straight down the track. The automobile bounded and the engine kept going and struck the car again and pushed it off to the depot side—to the [156] north side of the track. There is sort of a little drop there from the track, and the car dropped down, and there was a cloud of dust raised. Then I went over to see if anyone was hurt. I didn't see any bodies or anything fly through the air. To the best of my recollection there was no snow. Seeing the dust makes me think there was none. I have been employed by railroad companies in different capacities for six or eight years, although I am not at the present time. I have had considerable experience in judging the speed of trains. When I looked up and saw this train coming toward me between the curve and the crossing it was traveling at approximately 35 miles an hour, which was its usual speed through Monitor.

Cross-examination by Mr. MARTIN.

There was a depression of three or four feet near the depot to the north of the railroad tracks, where the automobile stopped after the accident. At the time of the collision the train was not going as fast as when I saw it first. At that time it was going about 35 miles an hour. I don't know just what distance from the crossing the train was when the air was applied, but the brakes slowed the train down from 35 miles an hour in my judgment. I heard the grinding and setting of the brakes, but

(Testimony of A. J. Flaherty.)

did not observe the position of the train at the time. I observed the position of the cars on the industry track at that time, but don't now remember where they stood. Plaintiff's Exhibit 5 does not show the cars on the industry track as they looked at the time of the accident. The car on the east was farther east than it is shown in this picture. The car on the west may have been there, and it may have been 10 or 15 feet above there. Every fall of the year it [157] is rather busy at that crossing. I would say that the car on the east was at least 15 feet east of the crossing. I don't remember about the car on the west, and can't tell what distance there was between the two cars.

WHEREUPON the deposition of C. C. MOORE, a witness on behalf of the defendant, was read in evidence by Mr. MATTHIAS:

Deposition of C. C. Moore, for Defendant.

My name is C. C. Moore, and I reside in Gooding, Idaho. I am 29 years old, and a student in Gooding College. On Thanksgiving Day, November 27th, 1919, I was in Monitor. I was helping unload a car of wood for the Columbia Valley Lumber Company. I saw the collision between a Chevrolet roadster and a Great Northern train about 3:30 P. M. on that day. I was about 400 feet east of the railroad crossing, working on a car on the industry track. I saw the train approaching the crossing before the collision. I was engaged in unloading wood. I was standing on the east end

(Deposition of C. C. Moore.)

of the car, facing west—the direction from which the train was coming. The train was coming around a curve, about a quarter of a mile from Monitor, and it was the whistle of the train that first attracted my attention. It was just coming around the curve. I looked up then when the whistle blew, and watched the train for a little while as it came around the curve. It had not yet arrived on the straight track, but I could see all of the train. I noticed a lot of steam rising from the whistle. I couldn't see any automobile on the crossing at that time. There was nothing on the passing track or main line track, and nothing between the industry and passing track or the passing and main-line tracks to obstruct my view of the [158] crossing and the approaching train. At this time I had been working at Monitor four or five days, and I had noticed this train on those days. I don't remember any days when it did not whistle at the curve. As near as I can remember the whistle which I heard on Thanksgiving Day, which was given at the curve, was one or two long blasts, and one or two short ones. This train whistled about the same place each day, and gave the same kind of a whistle. On the day of the accident the train was coming around the curve leisurely at about its ordinary speed of 30 or 35 miles an hour. It did not appear to be going any faster than on the other days. After I heard this first whistle I went on with my work. My attention was attracted to the train a second time by

(Deposition of C. C. Moore.)

the whistle of the engine. This whistle was two or three quick loud blasts. I then looked instantly in the direction of the train and the crossing. At that time I saw the automobile on the crossing. It was just getting on the passing track and the engine was about 150 feet west of the crossing. The train began to slow down. The automobile was going 5 or 10 miles an hour. The automobile seemed to turn a little bit to the right, weaving backwards and forward on the crossing. The situation looked critical. I have driven an automobile and in my opinion a car should be able to stop within 10 feet under the conditions existing there. I believe the driver could have stopped his car before running on to the main-line track, if he saw the train at the time I first saw it. An automobile going at the speed the deceased's automobile was going should be stopped in 10 feet. If it had good brakes and was in good condition it could have stopped easily before reaching the main-line tracks. There was a roadway between the passing [159] and industry tracks, and between the passing and main line tracks, sufficient for an automobile to turn in it. The driver of this automobile could have turned in it if he wanted to. The automobile was not going at such a rate of speed, but what it could have been turned in between any of the tracks. When I first saw the automobile there was nothing on the tracks or anywhere that would obstruct the view of those in the automobile, of the approaching train. The engineer had his head out

(Deposition of C. C. Moore.)

of the window and seemed to be in a crouching position. I saw the automobile and the train collide. The hind wheels of the automobile were just across the south rail of the main line track when the collision occurred. I didn't see any bodies or objects hurled through the air. The car was caught on the cowcatcher and rather bounced, pushed and shoved ahead of the engine. I was looking in that direction after the collision. The automobile was not directly in front of the engine. It was in front and a little bit to the left side of the engine. It was shoved and bounced along by the engine. I noticed the train after it came to a stop. It stopped directly opposite the place where I was working, which was probably 350 feet east of the station. I went around to where the bodies were lying on the west end of the depot platform. It could not have been over a minute or two until I was back there. There were blood spots on the west end of the station, about four or five feet above the platform. I don't think the bodies had been moved when I got there. I assisted in placing the bodies in the baggage-car. A man by the name of Pritchett and Mr. Young and a soldier arrived about the same time I did. I noticed the automobile after the collision. It was about [160] 15 feet west of the platform of the depot, turned with the radiator toward the track. The radiator and engine were somewhat battered. The body was practically torn to pieces. I could tell that it was a Chevrolet. Pieces of the top were on the depot

(Deposition of C. C. Moore.)

platform near the injured man. There were no cars standing on the passing track. There were cars standing on the industry track, just west of the crossing. The east end of the car on the industry track west of the crossing was directly opposite the east end of the warehouse near the crossing. There were cars standing on the industry track east of the highway. The first car east of the highway did not extend into the highway. The train was not in Monitor longer than five or ten minutes after the collision.

Cross-examination (On Cross-interrogatories by Mr. MARTIN).

I had resided in Monitor for about two weeks. I was working for the Columbia Valley Lumber Company, which was establishing a lumber-yard in Monitor. I was going down from Cashmere to Monitor every day to work for the Lumber Company. I worked in Monitor three days after the accident, at which time the Lumber Company called me back to Cashmere. I farmed in 1914 and 1915. In 1916 I was in the ministry. Until December, 1917, I attended college at Puget Sound. I served in the Navy during 1918 until December 23d of that year, and then farmed until October 10, 1921. At present I am a student in Gooding College. During the time I have mentioned I worked for myself the first two years. The next year I was pastor of the Washington Church at Wilbur. After getting out of the navy I farmed for myself until November 15, 1919, and then went to work for the Columbia

(Deposition of C. C. Moore.)

[161] Valley Lumber Company. I worked in a logging camp near Leavenworth from the 15th of December, 1919, to April 10th, 1920. I then farmed on my own farm at Ephrata until the 10th of October, 1921, at which time I became a student at Gooding College. I don't know how far the car on which I was working was from the easterly switch of the industry track or from the most easterly warehouse. There was one man working with me. I don't remember his name. He was standing on the west end of the car, facing east. We were throwing wood on the ground south of the car. No trucks or vehicles were helping us. We had unloaded about half of the car of wood. The wood remaining on the car was piled about 3 feet high. It was a flat car, and I was standing on the east end, with my face towards the west. I don't think I was working on the most easterly car. There were other cars east of the one I was on. I don't know how many cars were east or west of us, but the industry track seemed pretty well filled up. I don't know the name of the man working with me. Mr. Pritchard and Mr. Young were unloading a car up near the crossing. I didn't notice any narrowness between the cars at the crossing. There were no cars extending into the highway. An automobile could pass along the highway with a clear view of the track either way. I noticed spots or splotches of blood on the westerly end of the Monitor station immediately after the collision. They were about four or five feet above the depot platform. There

(Deposition of C. C. Moore.)

was one fairly large spot of blood and one or two smaller spots which were very noticeable. I do not think the bodies had been picked up before I reached that point. I didn't see the automobile before it crossed the industry track. I saw the automobile just as it went upon the [162] passing track. The automobile was going at the rate of 5 or 10 miles an hour, perhaps a little faster than a car usually crosses, and it seemed to be weaving one way and the other, turning first to the right and then to the left. I and the man working with me ran back to where the bodies lay after the accident.

Testimony of J. P. Nabours, for Defendant (Recalled).

J. P. NABOURS, recalled as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. MATTHIAS.

I remember where Mr. Moore, the man whose deposition has just been read, was working on the day of the accident. He was unloading off the west end of the car and I was on the other side of the wood-pile south of the industry track. We were practically opposite each other, at a right angle from the railroad tracks. The engine stopped right opposite the carload of wood on which Mr. Moore was working. As soon as I heard there had been an accident I ran around the front end of the train down to the point where the bodies lay. At that time the train had not been moved. I ran along the north side of the train. The train did not move

(Testimony of J. P. Nabours.)

again before I got down to the point where the bodies lay. The train backed up shortly. I don't know just how long a time elapsed. I heard the conductor tell the engineer to pull his train back and it backed up until one of the baggage-cars was opposite the point where the bodies lay. The train did not back up more than once. It seems to me that after the train backed up it stopped one of the baggage-cars opposite the bodies and then backed up a little farther and stopped the other baggage-car opposite the bodies. The two baggage-cars were right together in the train. [163] If the train did stop twice the rear end of the train was way down below the crossing at that time.

Cross-examination by Mr. MARTIN.

Mr. Moore was working on the west end of the car and was throwing the wood on the south side of the track, and he was facing west, although he was standing on the west portion of the car. Some of the wood was east of him on the car. Although not absolutely positive, I am quite sure that the car Mr. Moore was on was not east of the coal bins. I didn't see the automobile when it was struck. I heard the engineer make a remark to the man that was unloading wood that he had had an accident. At that time Mr. Moore was on the car unloading wood. I should judge it was six or seven hundred feet from the coal bunkers to the crossing. It might be eight or ten hundred feet.

WHEREUPON, on the agreement of counsel, Mr. Martin read into the record the American Mortality Tables, giving the expectancy of life at the age of 43 years to be 26 years and at 42 years to be 26.72 years.

Testimony of C. W. Sherman, for Defendant (Recalled).

C. W. SHERMAN, recalled as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. MATTHIAS.

I measured the distance along the route traveled by Mr. Slocomb on the day of the accident, from his driveway where he came out of his house to the main line crossing at Monitor, and found it to be 1,760 feet. That is to the point where he was hit.

WHEREUPON the defendant rested and the plaintiff [164] offered the following testimony in rebuttal.

Testimony of E. W. Simonson, for Plaintiff (Recalled—In Rebuttal).

E. W. SIMONSON, recalled as a witness on behalf of plaintiff, testified as follows:

Direct Examination by Mr. MARTIN.

I observed this automobile after the collision. Neither the windshield nor the lights were broken. The rear end of the machine and part of the top and seat were damaged. The front end of the automobile, including the windshield, lights, batteries,

(Testimony of E. W. Simonson.)

engine, front wheels, tires and radiator bore absolutely no marks of the collision. The automobile is now in use. Defendant's Exhibit "L" shows the automobile as it was after the collision. I heard trains working down toward Monitor the evening after the accident. The measurements I have given I took at the crossing not over an hour after the accident. They were the same the next day as the day I made the measurements.

Cross-examination by Mr. MATTHIAS.

On the night after the accident we were at Mrs. Slocomb's house during the evening. The regular trains that go through Monitor at night, are passenger trains Nos. 2 and 3 and Fast Mail No. 27; also the regular through freight.

Redirect Examination by Mr. MARTIN.

The rear end of the automobile was clipped off.

Recross-examination by Mr. MATTHIAS.

The rear end of the automobile was still on the car. It was struck and bent. The rear torsion rod connecting the engine with the differential was bent altogether.

Testimony of Inez Peterson, for Plaintiff (Recalled—In Rebuttal).

INEZ PETERSON, recalled as a witness on behalf [165] of the plaintiff, testified as follows:

Direct Examination by Mr. MARTIN.

I noticed the automobile after the collision. It had one wheel torn off. The back end was battered.

(Testimony of Inez Peterson.)

The windshield was not broken and the lights were turned on while the bodies lay at the depot. The steering gear was bent and the top torn off. The back end was badly battered and the wheel torn off. It stood almost parallel with the track. The engine was turned toward the track, facing east. The forward part of the car was not battered up at all.

Testimony of W. E. Long, for Plaintiff (Recalled—In Rebuttal).

W. E. LONG, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MARTIN.

I saw the automobile after the accident. Neither windshield nor lights were broken. The rear end was battered up and the hind wheel broken. The front wheels were intact.

Testimony of A. L. Long, for Plaintiff (Recalled—In Rebuttal).

A. L. LONG, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MARTIN.

I saw the automobile after the accident. The back end was battered up and all knocked to the side. The hind wheel was off, but the front end of the engine was not hurt. Neither lights nor windshield were broken.

Testimony of P. H. Pritchett, for Plaintiff (Recalled—In Rebuttal).

P. H. PRITCHETT, recalled as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MARTIN.

I removed the automobile late on the evening of [166] the 29th. The engine and electrical equipment of the car were in good mechanical condition. Neither windshield nor lights were broken. The steering was bent. The back part of the machine was badly damaged,—practically gone.

The defendant duly and timely requested the Court in writing before the close of the evidence and before any argument to the jury to instruct the jury as follows:

Defendant's Requested Instructions.

1. The jury is instructed to return a verdict for the defendant.

2. You are instructed that the Great Northern Railway Company has been dismissed as a party defendant in this case. If upon the evidence you determine that the plaintiff is entitled to a verdict, you are instructed that you cannot return a verdict against the Great Northern Railway Company, but only against James Cox Davis, as Director General of Railroads and Agent of the United States of America under the Transportation Act of 1920.

3. It is not the law in the State of Washington that at every road or street crossing in a village or city a railroad company is bound to place a watch-

man, or to install gates or gongs, or any other device for the safety of persons crossing the tracks at said point. The law in force at the time of this accident placed upon the Public Service Commission of the state the duty of determining the safety of railroad crossings and the necessity of maintaining a watchman and of installing gates or gongs or any other device upon particular crossings. Under this law the mayor or city council or other governing body of any city or town, or the county commissioners of any county within which any highway is crossed by any railroad, may petition the Public Service Commission for a change in the crossing to more adequately protect travelers on the highway, and the Commission may order [167] any change that it may deem advisable.

There is no contention in this case that any order directing the maintenance of a watchman or the installation of gongs or gates or any other device was made by the Public Service Commission. Therefore, the absence of the safety devices at the crossing where this accident occurred is of itself no evidence of negligence upon the part of the defendant, but the defendant is required to exercise all due and reasonable care for the protection of others who had the right to use this crossing, consistent with the reasonable running of its trains, and it is for you to determine whether or not, under all the circumstances of the case, the nature of the crossing and the amount of travel over it, the failure to maintain a watchman or to install gates or gongs or some other safety device at this crossing was, or was not,

violative of the duty owed by defendant to travelers on the highway.

4. When an automobile traveling upon a highway comes in collision with a train, at a grade crossing, such collision may be the result of the negligence of one of the parties, and not of the other, it may be the result of the negligence of both of the parties, or it may be a mere accident. Now, the law is, and I charge you that you should apply it, that if the collision in this case was a mere accident, then neither party can recover of the other; or if the collision was the cause of the fault or negligence of both parties, then neither can recover of the other, and your verdict should be for the defendant.

The plaintiff in this case can only recover if the collision was due to the negligence of the defendant, and the deceased was not at all negligent, and in this connection I charge you that because the deceased was killed, you are not therefore to infer negligence against the defendant. The fact of the injury or death is no proof whatever of negligence, and you must not treat it as [168] raising any presumption thereof, and in this connection I charge you that the fact that the defendant was operating a heavier vehicle, and one which when the collision occurred, caused the deceased to be killed, is no proof whatever of negligence on the part of the engineer or servants who were operating the locomotive of the defendant, and you should not treat it as raising any presumption whatever of negligence.

5. The law does not judge the conduct and act of the engineer by any different or more stringent

rule than it judges the act or conduct of the motorist upon the highway. Each should act as an ordinary reasonable, careful and prudent person under the circumstances in which he is placed, and you, as jurors, in determining the questions in this case, should not set up any other or more exacting standard of conduct or care for the engineer than you set up for the deceased, or for any other ordinary man placed in like circumstances.

6. You are not permitted to speculate as to whether the accident would have been as disastrous if the locomotive engineer had applied the brakes immediately upon seeing the automobile approach from behind the boxcars standing on the industry track. A locomotive engineer does not have to apply his brakes, or begin to stop his train upon seeing an automobile approaching the crossing. He has a right to assume that a motorist will not drive into danger, and he is under no duty to apply his brakes, or to attempt to stop his train, until it becomes apparent that the automobile is not going to stop and accord to the train the right of way.

The engineer on a railroad has a right to assume that a motorist at a highway crossing will look and listen before attempting to cross the railroad tracks, and that he will stop before attempting to cross, if he cannot see and hear without doing so, and he may lawfully act on the assumption until the conduct of [169] the motorist warns him to the contrary.

7. No rate of speed at grade crossings is of itself negligence. The very purpose of locomotion by

steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight, and this the law authorizes. To require railroads generally so to reduce their speed at all grade crossings as to avoid collisions with persons who may, carelessly or accidentally, be upon the crossing when the train is approaching, would defeat, to a great extent, the purpose of the existence of railroads.

On the other hand, it may be negligence under the conditions surrounding a particular crossing, to run a train over it at a high rate of speed. In this case it is for you to consider any and all objects that may have obstructed the view of a motorist on the highway, the distance between the tracks at this point, the condition of the crossing, the speed of the train, the giving, or failure to give, a warning of the train's approach, and any and all other facts and circumstances bearing upon the question, and determine from all the evidence before you whether it was negligence to operate this train across this crossing at the speed which you find it was going at this place on the day in question.

I further instruct you that even if you should find from this evidence that the train was going at a rate of speed which you believe was negligent, you should not find for the plaintiff on that ground alone, unless you further believe that the speed of the train was the cause of the collision, without any contributory negligence on the part of deceased, or anyone for whose negligence deceased was answerable. If you believe deceased, or some one for

whose negligence he is answerable, was guilty of negligence, contributing, as hereinafter explained to you, as one of the proximate [170] causes of the collision, then I charge you plaintiff is not entitled to recover, even though you should believe that the speed of the train was excessive.

8. A railroad track is a danger signal, and it is the duty of the driver of an automobile to approach a grade crossing with his machine under control, and to keep a vigilant lookout for any train that may be approaching. Likewise, it is the duty of a passenger in an automobile to exercise care for his safety, as you are herein instructed. Both the train and the traveler on the highway have a legal right to pass over the crossing, and to require due care on the part of the other to avoid a collision. From the character and movement of a railroad train and the fact it travels on fixed rails, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give the right of way to an approaching automobile to negotiate the crossing first.

It is the duty of the automobile to wait for the train, which, when both are approaching the crossing at the same time, has the right of way, but the parties are on equal terms as to the exercise of care and diligence in regard to their relative duties. The fact that the train has the right of way does not impose upon the traveler upon the highway the whole duty of avoiding a collision. The locomotive engineer has a right to asume that a motorist will not drive into danger, and he is under no duty to

apply his brakes, or to attempt to stop his train, until he sees that the automobile is not going to stop and accord to the train the right of way. Both the engineer and the motorist are charged with the mutual duty of keeping a careful [171] lookout for danger, and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case, in endeavoring fairly to perform his duty.

9. If you find that defendant was not guilty of negligence, that ends the case, and your verdict should be for the defendant.

In any event, I charge you that you cannot find for the plaintiff unless you find by a preponderance of the evidence that the defendant was guilty of negligence. It does not make any difference, unless you find this fact, what other facts there are in the case. If the train of the defendant at the time of the accident was being operated in an ordinary careful and prudent manner the plaintiff cannot recover in this case.

If you find that the defendant was guilty of negligence, then a second point of inquiry arises, whether the deceased, or someone for whose negligence deceased is answerable, was also guilty of negligence, and whether his negligence contributed as a proximate cause of the collision. If you find that the deceased or some one for whose negligence deceased is answerable, was guilty of negligence, and that such negligence directly contributed as a proximate cause of the collision, then it is not important to inquire how far such negligence contrib-

uted to it. If it contributed to it at all as a proximate cause thereof, your verdict should be for the defendant.

A person is guilty of contributory negligence in one of two ways: The first way is when he does something [172] which an ordinary prudent person would not do under the same circumstances. The other way is when he fails to take such precautions for his safety as an ordinary prudent careful person would take under the same circumstances and conditions. Now, if he does the first thing, or neglects to do the second thing, as I have detailed them to you; in other words, if he does what an ordinary prudent careful person would not do, or if he fails to do what an ordinary prudent careful person would do, under the same circumstances and conditions, then that is what the law calls contributory negligence, and if such negligence on his part contributes to any injury which he receives, and is the proximate cause of his injury or death, then there can be no recovery for his injuries or death. It does not make any difference in that connection whether you should find that the defendant was guilty or not in any of those instances in which negligence has been charged in the complaint, if you find that the deceased himself, or someone for whose negligence he is answerable, was guilty of contributory negligence in any of those ways in which I have attempted to define them to you, and that such contributory negligence contributed to his death, and was one of the proximate causes thereof.

10. Turning now to the conduct of the deceased,

Wilson M. Slocomb, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, as you apply that test to the defendant in his situation, you will understand that, no matter how negligently the defendant ran its train, or how unreasonably he neglected to provide sufficient safeguards at the crossings, [173] if the deceased brought his death upon himself by his own negligence, or if it was brought upon him by some one for whose negligence he is answerable, then his administratrix, the plaintiff in this case, is not entitled to a verdict in this suit.

So, if you find that the deceased, Wilson M. Slocomb, was familiar with this crossing and its dangers; that he frequently used it and knew how to act in using it to protect himself, and that under the special circumstances which you find, he failed to act as a prudent and cautious man should have acted, or that he omitted some precaution that a prudent man ought to have taken, whereby he lost his life, the plaintiff cannot recover. He should use all his faculties of seeing and hearing; he should approach cautiously and carefully; should look and listen and do everything that a reasonably prudent man would do before he attempted to negotiate the crossing; scrutinize his acts and doings under the light of the then situation, the nature and character of the crossing, the fact of the difficulty of observation, the time of day, and the probability of danger from passing trains, the fact that three men were riding in a two passenger roadster, the fact that his view was partially obscured by warehouses, the

fact that there were three parallel tracks, and that the train was approaching on the third track, making considerable noise, and every fact and circumstance bearing on the case to influence his conduct at that time, and under those circumstances say, upon your fair and impartial judgment, whether he acted as a reasonably prudent man should have acted, and with the due care and caution demanded by the exigencies of the occasion.

If deceased did so act, and the defendant was [174] negligent his administratrix is entitled to your verdict. If deceased did not so act, the defendant is entitled to your verdict, whether defendant was negligent or not. If defendant was not negligent he is entitled to your verdict, no matter how the deceased, Wilson M. Slocomb, may have acted.

11. Should you believe from the evidence that the deceased knew, or by the use of reasonable diligence might have known of the approach of defendant's train, and thereby have avoided danger, then you will find for defendant.

If the deceased's failure to use the care that a person of ordinary prudence would have used under the circumstances was the approximate cause of his death, then plaintiff cannot recover, although defendant may have also been guilty of negligence in running the train at an excessive rate of speed, or in failure to give warning of the train's approach, or in any of the other ways alleged in the complaint.

12. Even though the jury believe the train was running at a fast rate of speed, and that no bell was rung or other signal given of the approach of the train to the crossing, and that such conduct on defendant's part was negligence, still this or any other negligence of the defendant did not excuse the deceased from using proper care for his own safety. He should have listened and looked all the time until he reached the crossing, and if his failure to do either was the cause of his injury, then he was guilty of contributory negligence, and your verdict must be for the defendant.

13. You are instructed that the deceased, Wilson M. Slocomb, was the owner of the automobile, and that it is [175] wholly immaterial, so far as this case is concerned, by whom the automobile was driven at the time of the accident, except, if you believe it was driven by the son, Cecil, then you are instructed that you should consider the deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving. The owner of an automobile who rides in it while it is driven by another, is answerable for the negligence of the driver, and if you find in this case that the driver of the automobile was negligent, and that his negligence in any degree contributed as the approximate cause of this collision, then I charge you that the plaintiff is not entitled to recover, and your verdict should be for the defendant.

13a. You are instructed that it is conclusively presumed that the deceased, Wilson M. Slocomb,

was the owner of the automobile. You need not concern yourselves with the question as to who was driving the automobile at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should consider deceased's duty under the circumstances, not only as owner, but as the father of the boy who was doing the driving. The deceased was an occupant of the automobile, and whether it was driven by him or by some other person, he is answerable for the negligence of the driver.

If you find in this case that the driver of the automobile, no matter by whom it was driven, was negligent, and that his negligence contributed in any degree as a proximate cause to the collision, then I charge you that plaintiff is not entitled to recover, and your verdict should be for the defendant. [176]

13b. You are instructed that an automobile is personal property, and that the law presumes that personal property in the possession of a mature man is his own, and the burden of proving that this automobile was the property of the son, Cecil Slocomb, is on the plaintiff.

In this connection you are instructed that the laws of the State of Washington provide that an application for a motor vehicle license must show the name of the owner of the automobile, with the business or residence address thereof, or both, if there be such, and that such application shall be made to the County Auditor by the owner of the vehicle, or his duly authorized agent, over the sig-

nature of such owner or agent, and that he shall certify on oath that statements therein are true to the best of his knowledge. The law also provides that no license shall be transferred from one person to another person, and if there is a transfer of the title to an automobile, before the new owner is entitled to operate it, he must take out a new license.

The law further provides that upon the sale or transfer of title of any motor vehicle, the seller or person who is conveying his interest therein, must remove his number plates therefrom, and delivery of the automobile or a change of ownership will not be deemed to have been made until the seller or party conveying his interest, has removed the number plates.

In determining the ownership of this automobile, you may consider any application that was made for a license, also any and all other facts and circumstances which tend to prove the ownership thereof. You should also consider whether deceased removed his number plates before he gave [177] the automobile to his son, Cecil, if you believe that he did give it to Cecil, and if you find that he did not remove his number plates then I instruct you that it will be conclusively presumed that the deceased was the owner of the automobile at the time of the accident, and you must disregard the evidence of the alleged ownership by Cecil.

14. You are instructed that not only would deceased be answerable for the negligence of the driver of the automobile if the driver was a person other than himself, but would likewise be answer-

able for his own negligence. Even a passenger in an automobile, of which he is not the owner, is obligated to use some degree of care for his own safety. It is his duty also diligently to look for an approaching train, and if he sees one, or in the exercise of ordinary care could have seen one coming and failed to give any warning to the driver, when the exercise of ordinary care of a prudent man placed in similar circumstances would have prompted him to do so, he is guilty of contributory negligence, which will bar a recovery for his death.

If you believe that the son Cecil was driving the car, then in deciding the question of whether deceased, Wilson M. Slocomb, was negligent, you should consider not only the fact that the deceased was the owner of the car, but also the relation of father and son, and the tender age of Cecil, and determine under those circumstances whether the deceased was negligent in any degree contributing as a proximate cause to the accident.

If you believe from the evidence that the son Cecil was driving the car, and that he was guilty of negligence which contributed in any degree as a proximate cause of the [178] collision or that the deceased, Wilson M. Slocomb, was guilty of negligence, either as driver of the car or as a passenger, while his son Cecil or Glen Long was driving the car, which in any degree contributed as a proximate cause to the collision, then I charge you the plaintiff cannot recover, and your verdict should be for the defendant.

14a. You are instructed if you believe from the evidence that the presence of three men in the roadster at the time of the collision contributed to the accident as one of the proximate causes, then the plaintiff cannot recover, and your verdict should be for the defendant.

15. If you believe from the evidence in this case that at the time of the collision the automobile was driven by some one other than deceased, Wilson M. Slocomb, then I instruct you that a person riding as a passenger in an automobile at a point where the highway crosses a railroad track, is required to exercise the same care, in so far as it is practicable for him to do so, to protect himself from injury that he would if he were doing the driving. He cannot rely wholly upon the driver exercising the proper degree of care to protect him from injury, and exercise no care himself. Thus, if the deceased knew, or in the exercise of reasonable care should have known that the automobile in which he was riding was approaching and about to cross railroad tracks upon which trains pass at any time, and was traveling at a speed which might render it impossible to stop or otherwise avoid a collision if a train passed along the tracks as the automobile passed across them, and that the driver of the automobile was not checking or [179] reducing the speed, and apparently was not looking out for trains which might be passing along the tracks, then it was deceased's duty to make a reasonable effort to ascertain whether a train was approaching and warn the driver of the automobile

that they were about to cross railroad tracks, and to endeavor to reduce the driver to check or slacken the speed until it could be ascertained whether a train was approaching and it was safe to cross the tracks.

In this connection, if you believe from this evidence that the deceased's minor son Cecil was driving the automobile at the time of the collision, and that his father was a passenger, then you should consider the relation of father and son and the opportunity and duty of the father to guide and control the acts of his minor son. If you find from the evidence that the conditions just stated existed, and that under them deceased made no effort to look out for danger or protect himself against it, and in consequence the automobile collided with the train, whereby the deceased was killed, then I charge you that deceased was guilty of negligence which contributed to his own injury, and the plaintiff is not entitled to recover damages therefor. You are further instructed that the duty owed by deceased as a passenger in the automobile is in addition to that owed by him as owner of the car. As owner of the automobile deceased was answerable for the negligence of the driver, and no matter by whom said automobile was driven, if the driver was negligent in approaching the crossing and but for that negligence this collision would not have occurred, then plaintiff cannot recover, even though defendant was also negligent. [180]

16. Even though you should find from the evidence that the speed of the train was excessive, or

that the engineer failed to give a warning of its approach, if such were the fact, it did not relieve the deceased, or the driver of the automobile, if a person other than the deceased, from the necessity of taking ordinary precautions for his safety. Negligence of defendant in these particulars would be no excuse for negligence on the part of the occupants of the automobile. A motorist is bound to listen and to look before attempting to cross a railroad track, and not to drive carelessly into a place of possible danger, but to have his automobile under control and to stop, if necessary. If by using his senses of sight and hearing, deceased or some one for whose negligence deceased is answerable, could have seen or heard the train in time to avoid a collision, but either failed to make use of his senses and drove thoughtlessly upon the track, or saw the train and attempted to beat it across the crossing, or did not see the train, but could have seen it if he had looked and could have stopped and avoided the collision, then deceased was guilty of negligence contributing to his death, so as to deprive plaintiff of her right to recover.

17. I charge you that on November 27, 1919, it was the law in this state that in no case shall any motor vehicle be driven, operated or moved at a rate of speed faster than 12 miles an hour at any crossing within the main, thickly settled or business portion of any city or town.

You are instructed that the point where this highway crossed the railroad tracks was within the main thickly settled or business portion of the town of

Monitor, [181] and if you believe from the evidence that the automobile was proceeding across this crossing at the time of the collision, at a rate of speed in excess of 12 miles per hour, then I charge you that the driver of the automobile was guilty of negligence, and if you believe that the speed of the automobile contributed to the collision as one of the proximate causes, then your verdict must be for the defendant, even though you should believe that the defendant was also negligent.

18. You are instructed, if you find that the deceased, by any act or omission on his part, or on the part of anyone for whose negligence he is answerable, was guilty of negligence, and that such negligence directly contributed as a proximate cause to the collision and deceased's death, then you will find for the defendant, regardless of whether or not he or his servants were also negligent.

In this connection you are instructed that it was the duty of the deceased, upon approaching said crossing, to have looked and listened at a point immediately before crossing the track where he could see and hear an approaching train, and if he was driving the automobile, to have it under such control, or if it was being driven by one for whose negligence he is answerable, as you are instructed herein, to cause the operator to have said automobile under such control that it could be stopped or turned aside, if necessary, in safety, between the point where he could see the approaching train and the railroad track upon which the train was traveling.

You are further instructed if upon approaching the track, deceased could not ascertain by looking and listening [182] that he could cross in safety, then it was his duty to stop before attempting to cross the track, or if the automobile was driven by one for whose negligence he is answerable, to cause said driver to stop said automobile, and to look and listen at a point where he could see and hear the approaching train, if you find from the evidence that the deceased did not look and listen upon approaching said track, at a point where he could have seen and heard, or that deceased did not cause the automobile to stop before crossing said track, when he could not cross in safety without doing so, and that his failure in this respect was the proximate cause of the accident, such failure would be negligence on the part of the deceased, and plaintiff cannot recover herein and your verdict must be for the defendant.

19. The duty of a person to look and listen before crossing a railroad, includes the duty to do that which makes looking and listening reasonably effective. If there is a permanent obstacle that obscures the view of an approaching train until the traveler on the highway is within a few feet of the railroad, it is the duty of the traveler on the highway to look and listen after he has passed the permanent obstacle, and just before going upon the tracks.

You are instructed that if this automobile was driven toward the crossing at such a rate of speed that the driver was unable to check and stop it in

time to escape a collision with a passing train, after arriving at a point where the occupants of the automobile must have seen the approaching train, if they had looked, and where a collision could have been avoided, then deceased was guilty of contributory negligence and your verdict must be for the [183] defendant.

20. You are instructed if, after passing the boxcars standing on the industry track, the approaching train was in full view of the occupants of the automobile, if they looked in that direction, and, if you further find at that time the automobile was traveling at a rate of speed which would have enabled the driver of the automobile to stop or turn aside and avoid a collision with the train, if he had looked in the direction of the train and seen it approaching, or if you find that the occupants of the automobile obtained or could obtain their first view of the approaching train immediately after passing the boxcars standing on the industry track, and that at that time the driver of said automobile did not have his machine under control, so that he could stop or turn aside and avoid a collision if a train was approaching, then, and in that event, the driver of the automobile was guilty of negligence and deceased, Wilson M. Slocomb, as the owner of the automobile, was responsible for such negligence, and if you so find, your verdict should be for the defendant.

21. You are instructed if, after passing the boxcars standing on the industry track, the approaching train was in full view of the occupants of the

automobile, if they looked in that direction, and if you further find at that time the automobile was traveling at a rate of speed which would have enabled the driver of the automobile to stop or turn aside, and avoid a collision with the train, if he had looked in the direction of the train and seen it approaching, then in that event the driver of the automobile was guilty of negligence, [184] and deceased, Wilson M. Slocomb, as the owner of the automobile, was responsible for the said negligence of the driver, and, if you so find, your verdict should be for the defendant.

22. The attorneys for each party in this action have the right to talk with their respective witnesses before placing them upon the stand, and each party to the action has a right to pay their witnesses a reasonable sum for their time necessarily spent in connection with the trial of the action, and their expenses during their attendance upon the trial as witnesses, and to provide the necessary transportation for such witnesses from the place of residence of such witnesses to and from the place of trial.

23. Your verdict, if you find for plaintiff, must be confined solely to the pecuniary loss the widow has sustained by her husband's death. The plaintiff is not entitled to recover anything for loss of profits on the ranch which deceased might have operated had he lived. Her recovery should be measured by what the deceased would have earned as an orchardist, had he lived, based on what was being paid at the time of his death, in the vicinity

of his ranch, for the kind of services performed by him, and that proportion of his earnings he would have contributed to plaintiff's support. In determining this question you should base your decision, if you find plaintiff is entitled to a verdict, on the value of deceased's services as an orchardist, and his earning capacity, entirely independent of his income from invested capital. Likewise, plaintiff is not entitled in this case to recover anything for the [185] death of her son.

I caution you that you are not to let any consideration of sympathy or other feelings of that sort enter into your verdict in any way, either as to whether it should be for the plaintiff or for the defendant, or, in case you should find for the plaintiff, as to the amount of it. While you should not allow anything to plaintiff for sorrow, grief and pain, or for the mere loss of society of deceased, you should take into consideration, not only his earning capacity as an orchardist, based upon what was being paid at the time of his death in the vicinity of deceased's ranch for the kind of services performed by him, independent of his income from invested capital or profits from the ranch, but also the care and attention which such a man would give to his wife, and the loss of his advice as a husband, which the plaintiff has suffered by his death.

Plaintiff is entitled to be compensated only for the substantial and material benefits which she would have received from the deceased if he had lived, and which she has lost by his death. That includes whatever support she would have received

from him and the net earnings which he would have earned and ultimately applied to her benefit, and the loss of his care and advice as a husband.

Here the testimony was closed and both sides rested.

Whereupon the defendant submitted a challenge to the sufficiency of the evidence to sustain a verdict in favor of the plaintiff, and moved the Court to direct the jury to return a verdict for the defendant and against [186] the plaintiff, on the following grounds:

First. The evidence showed, as a matter of law, that the defendant was not guilty of negligence.

Second. The evidence showed, as a matter of law, that the deceased, Wilson M. Slocomb, was guilty of negligence which was the sole and proximate cause of his death.

Third. If the evidence showed that the defendant was guilty of any negligence, it further showed that the deceased, Wilson M. Slocomb, was guilty of contributory negligence as a matter of law, which contributory negligence was one of the contributing and proximate causes of deceased's death.

Fourth. The evidence justified only one verdict, and that a verdict for the defendant.

Fifth. The evidence was wholly insufficient to warrant a verdict for the plaintiff.

Sixth. There was nothing in the evidence or any fact which the jury could lawfully infer from the evidence, on which the jury could return a verdict for the plaintiff.

Seventh. The evidence was susceptible of but one conclusion, that the deceased was guilty of negligence as a matter of law, which was either the sole cause of his death or one of the proximate and contributing causes thereof.

The motion was by the Court denied, and an exception allowed to the defendant.

Whereupon the following proceedings were had:

"Mr. MATTHIAS.—I would like to call your Honor's attention to a couple of requested instructions, which I passed up, which have to do with the statute of [187] this state with reference to automobile licenses, and a decision which interprets that statute. If your Honor would like to look at the statute I have the citation of it, and also a decision interpreting it.

"The COURT.—You may give them to me and I will look at them during the recess which will come shortly. Counsel may address the jury."

The following statutes and decision were thereupon called to the attention of the Court:

> Chapter 142 Laws of Washington 1915; Section 5562–5 R. & B. Code of Washington; Chapter 155, Laws of Washington, 1917; Peters vs. Casualty Company of America, 101 Washington, 208.

Both parties thereupon argued the case to the jury.

The Court then instructed the jury as follows:

Instructions of Court to the Jury.

The COURT.—This case has taken a considerable length of time to try and a considerable verdict is asked at your hands, and the Court is not aware whether you have had any other cases this term of a similar nature. Lengthy requests have been asked by counsel to be given the jury. For all these reasons I will charge you at some length on the law of the case. The case has been well explained to you by counsel in the case and well tried.

This is a suit for damages alleged to have been caused by the defendant's negligence at a crossing in a town. The defendant denies that it was negligent and avers that deceased's death was caused by his own negligence. The plaintiff in her reply denies that the deceased was negligent in any way contributing to his injury or to his death. Now, these, briefly, are the issues that you are called upon to try; and if you find for the plaintiff, the further [188] question of the amount at which you assess her recovery.

This is an action brought by Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, Deceased, against the Great Northern Railway Company, a corporation, and James Cox Davis, as the agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920. The case has been dismissed as to the Great Northern Railway, as its railroad had been taken over by the United States, and was being operated at the time of the injuries alleged

to have occurred, by Walker D. Hines, Director General of the Railroads of the United States of America under Act of Congress of August 29th, 1916. James Cox Davis is the agent of the United States Government for the purpose of prosecuting any action for damages arising out of the operation of the railroads which had been taken over by the Government, during the time they were operated by the director general of the United States. So that the only defendant in the case is James Cox Davis as agent of the United States of America.

It is admitted that Wilson M. Slocomb was the husband of the plaintiff, Marion C. Slocomb, and was killed on the 27th day of November, 1919, at about the hour of 3:30 P. M., while traveling in an automobile upon the public highway over the railroad tracks of the Great Northern Railroad at Monitor, Washington, by what is known as the Great Northern east bound passenger train No. 26.

The plaintiff alleged that she is the duly appointed, qualified, and acting administratrix of the estate of Wilson M. Slocomb, deceased; and it is alleged by the plaintiff and admitted by the defendant that on the 27th [189] of November, 1919, the Great Northern system of railroads was being operated by Walker D. Hines, director general of the Railroads of the United States of America, under an Act of Congress of August 29, 1916, as a common carrier of freight, passengers, mail and express for hire between the City of Seattle and St. Paul, and through the town of Monitor, Washington.

It is also alleged by the plaintiff, and admitted

by the defendant, that the defendant, James Cox Davis, is the agent of the United States of America designated by the President as the agent against whom suits should be brought, pursuant to Sec. 206 of the Transportation Act approved February 28, 1920, upon claims arising while said railroad was being operated by the director general of railroads under the Act of Congress dated August 29, 1916.

It is further alleged by the plaintiff that the defendant the Great Northern Railway Company maintains three railroad tracks running in a southeasterly direction through said town of Monitor. That the main thoroughfare and public highway between the City of Cashmere and the City of Wenatchee runs through and crosses said railroad tracks at the town of Monitor and is the principal street through said town. That said public highway, as it approaches the town of Monitor from the Northwest, runs parallel to said tracks for about forty rods and just before crossing said tracks, turns and runs easterly and crosses said tracks in a diagonal direction and at an angle of approximately forty degrees. The most southerly of said tracks is known as the industrial track, the center track as the passing track, and the northerly track as the main track. [190]

Then the complaint goes on to describe the situation of the warehouses and the boxcars left on the industrial track, and describes the condition of the plank crossing, and then sets up that the deceased was invited to ride with Cecil W. Slocomb in a car alleged to belong to Cecil Slocomb, and describes

how the view of the railroad track was obscured as you approach in an automobile, and alleges that the automobile was stopped and that all the occupants of the car looked and listened for an approaching train.

It is further alleged that the injuries to, and the killing of, the said Wilson M. Slocomb, were caused wholly and solely and approximately by the carelessness and negligence of the defendant, without any fault on the part of said decedent Wilson M. Slocomb, as follows:

It is alleged that the defendant was negligent in causing said train to be run at a high and excessive and dangerous rate of speed upon a slightly down grade through said town of Monitor, and across its said public highway and street where many pedestrians, automobiles, and conveyances were in the habit of crossing almost constantly.

It is alleged that the defendant carelessly and negligently failed to cause the bell upon the locomotive to ring or the whistle upon said locomotive to be sounded before crossing the said public highway and principal street in said town of Monitor.

It is also alleged that the defendant carelessly and negligently allowed and permitted a large number of freight-cars to remain standing upon their said industrial track in said town of Monitor upon the northwesterly side of said public highway and street crossing said tracks, leaving scarcely sufficient width remaining on the highway [191] for an automobile to drive over in crossing said track, whereby the view of said approaching train was

shut off until said automobile had crossed the first of said tracks, and that neither said Wilson M. Slocomb nor Cecil W. Slocomb, who was driving said machine, nor Glen Long who was also riding in the machine, had any knowledge or intimation whatsoever of the approach of said train either by whistle, bell, sound or otherwise, in time to prevent said train's colliding with said automobile and striking and killing said Wilson M. Slocomb.

It is further alleged that the said defendant carelessly and negligently allowed and permitted said public highway in crossing its said right of way and tracks at Monitor, to get out of repair and become rough, rutty, difficult, dangerous, and hard to drive vehicles over, and failed and neglected to plank said highway between tracks and rails and requiring close and additional attention and care on the part of drivers of automobiles and vehicles in driving over the same, and to give close and additional attention to the driving of their automobiles and vehicles, in order to avoid breaking and damaging the same, and injuring the occupants riding therein, which condition of said crossing had remained as stated for a long time prior to the 27th day of November, 1919, and of which the defendant had been frequently notified and had been requested to repair and had full knowledge and notice thereof.

It is also further alleged that it was the custom of the defendant for a long time prior to said 27th day of November, 1919, to permit said empty freight boxcars to stand and remain upon its sidetracks at Monitor as aforesaid, on the northwesterly

side of said public highway [192] and street, and extending close into the center thereof, at said crossing, leaving only sufficient space for a machine or vehicle to pass over and around the end of said cars. That there were and are also a number of warehouses situated along the tracks of the said Railway Company near said crossing, and upon either side thereof, so that the view of anyone approaching said crossing from a westerly or northwesterly direction is obstructed for five hundred feet or more, and that northerly or westerly of said highway crossing the track turns abruptly to the north, so that trains coming from the west cannot be seen at said crossing until within a distance of about twenty-five rods, and that, by reason of the premises, said crossing was on the 27th day of November, 1919, and for a long time prior thereto, an exceptionally dangerous crossing, concerning all of which the defendant had been frequently notified, and had full knowledge and notice.

It is alleged that notwithstanding, the defendant carelessly and negligently failed to employ a watchman or to install gates or gongs or any other device at said crossing for the safety of persons crossing said tracks at said point. That the said street in said town of Monitor is a public highway connecting the towns of Cashmere and Wenatchee.

It is also alleged that the defendant carelessly and negligently omitted and neglected to take any steps to check or stop its said train after first seeing that the said automobile in which the decedent

Wilson M. Slocomb was riding was in the act of crossing said tracks.

It is also alleged that the said Wilson M. Slocomb at the time of his death, was the husband of Marion [193] C. Slocomb, was 43 years of age, was an experienced orchardist, and prior to said collision was a healthy, able-bodied man, able to earn and was then earning the sum of $7,500 per year net, was a prudent, kind and affectionate husband and had a reasonable expectancy of life and of continuing to earn said sum and more for the full period of 25 years.

It is also alleged that the said Wilson M. Slocomb left surviving him his widow, who was wholly dependent upon the earnings of the said Wilson M. Slocomb for her livelihood, and that by his death she has lost her sole means of support and maintenance, his further earnings and accumulations, his foresight and management, and has been deprived of his comfort and society, his advice, counsel, and foresight as a husband, and that the plaintiff, in her own behalf, and as administratrix of said estate, has been injured and damaged in the premises, and by reason of the carelessness and negligence of the defendant as herein alleged, in the full sum of $75,000.

The defendant James Cox Davis, as agent, in his answer alleges that he does not have sufficient information to form a belief as to the first paragraph of plaintiff's complaint, which is that the plaintiff is the duly appointed, qualified and acting administratrix of the estate of Wilson M. Slocomb,

deceased, and admits that the three railroad tracks owned by the Great Northern Railroad Company running in a southeasterly direction through the town of Monitor, and that a public highway running between the city of Cashmere and the city of Wenatchee crosses said railroad tracks in the town of Monitor. It admits that there are a number of warehouses along said railroad tracks in the town of [194] Monitor; admits that at the time Wilson M. Slocomb was killed there were some boxcars standing upon the siding at some of the warehouses; admits that on the 27th of November, 1919, Wilson M. Slocomb was riding in an automobile upon said highway which runs from Cashmere to the city of Wenatchee, and through the town of Monitor, and was crossing said railroad tracks when his automobile collided with a train operated by the defendant, resulting in the death of said Wilson M. Slocomb.

The answer denies negligence on the part of the defendant, and denies the damages alleged, and further alleges for a further, separate and first affirmative defense to plaintiff's cause of action, that if the deceased met his death as in plaintiff's complaint alleged, the injuries resulting in deceased's death and his death resulted from the negligent acts and omissions of the deceased himself, and the deceased by his own negligent acts and omissions directly contributed to his death.

For a further, separate and second affirmative defense to plaintiff's complaint, the defendant alleges that at the time of said collision the

deceased, his son Cecil W. Slocomb, and an employee of deceased named Glen Long, were the only occupants of the said automobile; that the automobile was the property of the deceased, and that at the time of the collision the occupants of the said automobile were engaged in a joint and common enterprise, and if deceased met his death as the result of said collision, his death resulted from the negligent acts and omissions of deceased's son Cecil W. Slocomb, and deceased's employee, Glen Long, which combined with the negligent acts and omissions of the deceased himself directly contributed to [195] deceased's death.

The Court instructs you that the burden of proof is upon the plaintiff in this case to satisfy you of the truth of the material allegations of her complaint, and before the plaintiff can recover a verdict, you must be satisfied by a fair preponderance of the evidence of the truth of the material allegations of her complaint. It is proper, however, for me to say that plaintiff is not obliged, in order to recover a verdict in this case, to prove all the separate grounds of negligence set up in her complaint. It is sufficient if you are satisfied by a preponderance of the evidence, that any of the grounds of negligence have been proven, and that such negligence was the approximate cause of the killing of the decedent, Wilson M. Slocomb. And, in that event, your verdict should be for the plaintiff, unless you find that he or the driver of the automobile was guilty of contributory negligence as hereinafter defined.

By the "fair preponderance of the evidence" is meant the greater weight of the credible testimony in this case. Not necessarily that the plaintiff should have a greater number of witnesses, because you might believe the greater weight to be with one witness, as against more than one. But you will understand that the number of witnesses testifiying on a particular point is something for you to take into account. It is only human experience that a number of people are not as liable to be mistaken as one under the same circumstances, and yet the one might have some peculiar advantage in knowing just what took place, that when properly considered you would think that he had a better opportunity, and that you would find the [196] weight of evidence with him as against a larger number because he had that advantage. But the number of witnesses, as I told you in the beginning, is something to take into account in determining what the facts were.

This case rests upon the question of negligence. By "negligence" is meant the doing of something which an ordinarily prudent and careful person would not do under like or similar circumstances, or a failure to do something which an ordinarily prudent and cautious person would have done under like or similar circumstances.

Negligence is the want of ordinary care. Ordinary care is always to be determined in view of the danger and peril reasonably to be apprehended from the want of proper prudence.

By "contributory negligence" is meant some negligent act or acts on the part of the decedent, Wilson M. Slocomb, which approximately, that is, directly caused or contributed to the plaintiff's injuries causing the death of Wilson M. Slocomb complained of.

The burden is upon the plaintiff to establish the negligence charged in her complaint against the defendant, and the burden is upon the defendant to establish the contributory negligence charged in its answer against the plaintiff. It will be easy for you to understand that negligence applies to the acts of the defendant and contributory negligence to the acts of the deceased.

Neither negligence nor contributory negligence is ever presumed, but must be proven like any other disputed fact in the case.

I instruct you that under the laws of this state it was the duty of the defendant in this case to ring the bell or sound the whistle upon the locomotive at least eighty rods from the place where the defendant railroad crosses the public highway in the town of Monitor, and [197] also to continue such ringing of the bell or sounding of the whistle until the locomotive shall have passed said crossing. And, if you believe that the defendant failed to perform this duty, then, in that event, the defendant would be guilty of negligence.

The Court instructs you that the obligations, rights, and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of

the one than the other. The railway train has a right of precedence at crossings, but the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the automobile the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of a train to give due and timely warning of approach. The duty of the automobile to yield the precedence is based upon this condition. The train has the preference of right of way, but it is bound to give due warning of its approach so that the automobile may stop and allow it to pass, and to use every exertion to stop if the automobile is unavoidably in the way. Such warning must be reasonable and timely.

The plaintiff in this case claims that the defendant caused its train to pass over the crossing in question at a careless and negligent rate of speed, and that it failed to give reasonable and proper warning of the approach of the train to the crossing. This is denied by the defendant. It is therefore for you to say, under all the evidence, and in the light of all the facts and circumstances established by the evidence, whether the defendant did in fact cause its train to approach and pass the crossing at a [198] negligent and careless rate of speed, and whether it in fact gave a suitable and proper warning of the approach of the train. In determining whether or not the defendant did cause its train to pass over the crossing at a negligent and careless rate of speed and in determining

whether it did in fact give reasonable and proper warning of the approach of the train to the crossing, you will take into consideration the character of the crossing, the frequency of its use by the public, the populousness of the town and vicinity, the character of the obstructions, if any, to the view of persons approaching the crossing from the west, and all facts and circumstances established by the evidence.

I further charge you that it is an established rule of law that one person will not be allowed to impute a want of vigilance to another by his act if that very want of vigilance were the cause of an omission of duty on his part; that is, if the defendant, by its act, threw plaintiff's decedent off his guard, his lack of vigilance caused thereby, cannot be regarded as negligence, and one is not chargeable with contributory negligence in failing to anticipate the negligence of another and in not providing against it. In other words, every one has a right to presume that another will act in a lawful and proper manner. Consequently, the law will not hold it imprudent in a person to act upon the presumption that the other has done or will do his duty.

Now, that is true as a general proposition. That is, he is entitled to act on the assumption that the other,—that is, the railroad,—the operators of the railroad train in this case will do their duty and comply with the law, unless there is something in the situation that would have [199] warned an ordinarily careful and prudent person that the operators of the train would not do their duty.

While there is no statute in this state limiting the speed at which trains may be operated, yet, notwithstanding this, it was the duty of the defendant at all times to maintain no greater speed with its trains than was consistent with the reasonable safety of those having occasion to cross its tracks and highways in a careful and prudent manner. The speed of trains should be gauged and controlled according to the dangers likely to be encountered. This is also true of the automobile. Thus, greater care in this regard should be taken in passing through towns and villages and over crossings where persons are liable to be.

If you find from the evidence that the deceased, Wilson M. Slocomb, might have avoided the accident by adopting some course of action other than that pursued by him, he would not necessarily be guilty of contributory negligence in that respect, provided that you find that he acted as an ordinarily careful and prudent person would have acted under such circumstances and conditions, and you further find that an ordinarily prudent man under the particular circumstances surrounding the said Wilson M. Slocomb, at the time would have been justified in adopting the course that he pursued. His conduct in that regard is not necessarily to be judged by the facts as they now appear before you, subjected to the cool, calm consideration of all the facts and circumstances as they are now made to appear, but plaintiff is entitled to have the acts and conduct of the said Wilson M. Slocomb considered in the light of facts as they appeared to him at the time,

and if you find that an ordinarily careful and prudent man would have [200] acted as Wilson M. Slocomb did, with his, Wilson M. Slocomb's view of all the circumstances and conditions as they were at that time, you will be justified in finding that he was not guilty of contributory negligence.

The term "proximate cause" as used in these instructions is defined as follows: "That which is the moving, efficient cause of the injury and damage, the proximate cause is that which sets in motion the chain of circumstances leading up to the injury and damage and which in natural and continuous sequence, unbroken by any new and independent cause, produced the injury and damage, as the natural and probable result, and without which the injury and damage would not have occurred.

What is reasonable care in a given case is to be determined by the circumstances and facts of that particular case. Negligence, or what is the same thing, the absence of ordinary care, is the foundation of this action, and is to be determined by what you find an ordinarily prudent and careful man would have done under the particular circumstances in the case. If, tried by this rule, you find defendant was not guilty of any of the acts of negligence complained of as causing the death of Wilson M. Slocomb, your verdict should be for the defendant. On the other hand, if, tried by this rule, you find that the death of Wilson M. Slocomb was caused solely by the negligence of the defendant, then your verdict would be for the plaintiff.

There is one other rule that you should consider in connection with that. If the deceased, Wilson M. Slocomb, was guilty of no contributory negligence and he had no control over the driver of the car, and the driver of the car was in no way responsible to him, and the car did [201] not belong to the deceased, and the collision was the result of concurring negligence of both the railway company in the operation of its train, as complained of in the complaint, and the driver of the automobile over whom the deceased had no control, and in a car in which he had no interest and exercised no control, the plaintiff would be entitled to recover. I will instruct you further regarding the question of concurring negligence later.

If you believe the plaintiff has proven by a preponderance of the evidence the material allegations set forth in the complaint, and denied in the answer of the defendant, as hereinbefore defined and explained, then it will be your duty to find for the plaintiff, unless you find for the defendant upon its defense of contributory negligence. On the other hand, if you believe the plaintiff has failed to prove by a preponderance of the evidence, the material allegations set forth in the complaint, and denied in the answer of defendant, then it will be your duty to find for the defendant, or if you believe that the defendant has proven by a preponderance of the evidence the material allegations alleged and set forth in its affirmative defense, then it would be your duty to find for the defendant.

I instruct you that the uncontradicted evidence in this case shows the expectancy of life of Wilson M. Slocomb, at the time of his death, was 26 years, while the complaint alleges 25 years.

There is no contention in this case that any order directing the maintenance of a watchman or the installation of gongs or gates or any other device was made by the Public Service Commission. Therefore, the absence of the safety devices at the crossing where this accident occurred does not [202] of itself establish negligence upon the part of the defendant. The defendant is required to exercise all due and reasonable care for the protection of others who had the right to use this crossing, consistent with the reasonable running of its trains, and it is for you to determine whether or not, under all the circumstances of the case, the nature of the crossing and the amount of travel over it, the failure to maintain a watchman or to instal gates or gongs or some other safety device at this crossing was, or was not, violative of the duty owed by the defendant to the public on the highway.

When an automobile traveling upon a highway comes in collision with a train at a grade crossing, such collision may be the result of negligence of one of the parties and not of the other, it may be the result of the negligence of both of the parties, or it may be a mere accident. Now the law is, and I charge you that you should apply it, that if the collision in this case was a mere accident, then neither party can recover from the other, or, if the collision was the cause of the fault or negligence

of both parties, then neither can recover of the other, and your verdict should be for the defendant.

The plaintiff in this case can only recover if the collision was due to the negligence of the defendant, and the deceased was not guilty of contributory negligence, and in this connection I charge you that because the deceased was killed, you are not therefore to infer negligence against the defendant. The fact of injury or death is no proof whatever of negligence, and you must not treat it as raising any presumption thereof, and in this connection I charge you that the fact that the defendant was [203] operating a heavier vehicle, and one which, when the collision occurred, caused the deceased to be killed, is no proof of negligence on the part of the engineer or servants who were operating the locomotive of the defendant, and you should not treat it as raising any presumption of negligence.

The law does not judge the conduct and act of the engineer by any different or more stringent rule than it judges the act or conduct of the motorist upon the highway. Each should act as an ordinarily careful and prudent person would act under the circumstances in which he is placed. You, as jurors, in determining the questions in this case, should not set up any other or more exacting standard of conduct or care for the engineer than you set up for the deceased, or for any other ordinary man placed in like circumstances.

You are not permitted to speculate as to whether the accident would have been as disastrous if the locomotive engineer had applied the brakes imme-

diately upon seeing the automobile approach from behind the boxcars standing on the industry track.

A locomotive engineer does not have to apply his brakes, or begin to stop his train upon seeing an automobile approaching the crossing. He has a right to assume in the absence of something indicating the contrary, that a motorist will not drive into danger, and he is under no duty to apply his brakes, or attempt to stop his train, until it becomes apparent that the automobile is not going to stop and accord to the train the right of way.

The engineer on a railroad has a right to assume that a motorist at a highway crossing will look and listen before attempting to cross the railroad tracks, and that he will stop before attempting to cross, if he cannot see [204] and hear without doing so, and he may lawfully act on that assumption, until the conduct of the motorist warns him to the contrary.

No rate of speed at grade crossings is, of itself, negligence. The very purpose of locomotion by steam upon railways is the accomplishment of a high rate of speed in the movement of passengers and freight, and this the law authorizes. To require railroads generally so to reduce their speed at all grade crossings as to avoid collisions with persons who may, carelessly or accidentally, be upon the crossing when the train is approaching, would defeat, to a great extent the purpose of the existence of railroads.

On the other hand, it may be negligence under the conditions surrounding a particular crossing,

to run a train over it at a high rate of speed. In this case it is for you to consider any and all objects that may have obstructed the view of a motorist on the highway, the distance between the tracks at this point, the condition of the crossing, the speed of the train, the giving, or failure to give, a warning of the train's approach, and any and all other facts and circumstances bearing upon the question, and determine from all the evidence before you whether it was negligence to operate this train across this crossing at the speed which you find it was going at this place on the day in question.

I further instruct you that even if you should find from this evidence that the train was going at a rate of speed which you believe was negligent, you should not find for the plaintiff on that ground alone, unless you further believe that the speed of the train was the cause of the collision, without any contributory negligence on [205] the part of the deceased, or anyone for whose negligence deceased was answerable. If you believe deceased, or some one for whose negligence he is answerable, was guilty of negligence, contributing as hereinafter explained to you, as one of the proximate causes of the collision, then I charge you plaintiff is not entitled to recover, even though you should believe that the speed of the train was excessive.

A railroad track is a danger signal, and it is the duty of the driver of an automobile to approach a grade crossing with his machine under control, and to keep a reasonably vigilant outlook for any train that may be approaching. Likewise, it is the duty

of a passenger in an automobile to exercise care for his safety, as you are hereby instructed. Both the train and the traveler on the highway have a legal right to pass over the crossing, and to require due care on the part of the other to avoid a collision. From the character and movement of a railroad train and the fact it travels on fixed rails, and the requirements of public travel by means thereof, it cannot be expected that it will stop and give the right of way to an approaching automobile to negotiate the crossing first.

It is the duty of the automobile to wait for the train, which, when both are approaching the crossing at the same time, has the right of way, but the parties are on equal terms as to the exercise of care and diligence in regard to their relative duties. The fact that the train has the right of way does not impose upon the traveler upon the highway the whole duty of avoiding a collision. The locomotive engineer has a right to assume that a motorist will not drive into danger, and he is [206] under no duty to apply his brakes, or to attempt to stop his train until he sees that the automobile is not going to stop and accord to the train the right of way. Both the engineer and the motorist are charged with the mutual duty of keeping a careful lookout for danger, and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case, in endeavoring fairly to perform his duty.

If you find that the defendant was not guilty of

negligence, that ends the case, and your verdict should be for the defendant.

In any event, I charge you that you cannot find for the plaintiff unless you find by a preponderance of the evidence, that the defendant was guilty of negligence. It does not make any difference, unless you find this fact, what other facts there are in the case. If the train of the defendant at the time of the accident, was being operated in an ordinarily careful and prudent manner, the plaintiff cannot recover in this case.

If you find that the defendant was guilty of negligence, then a second point of inquiry arises, whether the deceased, or someone for whose negligence deceased was answerable, was also guilty of negligence, and whether his negligence contributed as a proximate cause of the collision. If you find that the deceased, or someone for whose negligence deceased was answerable, was guilty of negligence, and that such negligence directly contributed as a proximate cause of the collision, then it is not important to inquire how far such negligence contributed to it. If it contributed to it at all as a proximate cause thereof, your verdict should be for the defendant. [207]

A person is guilty of contributory negligence in one of two ways: The first way is when he does something which an ordinarily prudent person would not do under the same circumstances. The other is when he fails to take such precautions for his safety as an ordinarily prudent and careful person would take under the same circumstances and

conditions. Now, if he does the first thing, or neglects to do the second thing, as I have detailed them to you; in other words, if he does what an ordinarily prudent and careful person would not do, or if he fails to do what an ordinarily prudent person would do under the same circumstances and conditions, then that is what the law calls negligence, and if such negligence on his part contributes to any injury which he receives, and is the proximate cause of his injury or death, then there can be no recovery for his injuries or death. It does not make any difference in that connection whether you should find that the defendant was guilty or not in any of those instances in which negligence has been charged in the complaint, if you find that the deceased himself, or someone for whose negligence he is answerable, was guilty of contributory negligence in any of the ways which I have defined to you, and that such contributory negligence contributed to his death, and was one of the approximate causes thereof.

Turning now to the conduct of the deceased, Wilson M. Slocomb, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, as you apply that test to the defendant in his situation, you will understand that no matter how negligently the defendant ran his train, or how unreasonably he neglected to provide sufficient safeguards at the crossing, if the deceased [208] brought his death upon himself by his own negligence, or if it was brought upon him by someone for whose negligence he was answerable,

then his administratrix, the plaintiff in this case, is not entitled to a verdict in this suit.

So, if you find that the deceased, Wilson M. Slocomb, was familiar with this crossing and its dangers, that he frequently used it, and knew how to act in using it to protect himself, and that under the special circumstances which you find, he failed to act as an ordinarily prudent and cautious man would have acted, or that he omitted some precaution that an ordinarily prudent man would have taken, whereby he lost his life, the plaintiff cannot recover. He should use all his faculties of seeing and hearing; he should approach cautiously and carefully; should look and listen, and do everything that an ordinarily prudent man would do before he attempted the crossing; scrutinize his acts and doings, under the light of the then situation, the nature and character of the crossing, the fact of the difficulty of observation, the time of the day, and the probability of danger from passing trains, the fact that three men were riding in a two passenger roadster, the fact that his view was partially obscured by warehouses, the fact that there were three parallel tracks, and that the train was approaching on the third track, making considerable noise, and every fact and circumstance bearing on the case, which should influence his conduct at that time, and under those circumstances say, upon your fair and impartial judgment, whether he acted as a reasonably prudent man would have acted, and with the due care and caution demanded by the exigencies of the occasion.

If deceased did so act, and the defendant was negligent, [209] his administratrix is entitled to your verdict. If deceased did not so act, the defendant is entitled to your verdict, whether defendant was negligent or not. If the defendant was not negligent, he is entitled to your verdict, no matter how the deceased, Wilson M. Slocomb, may have acted.

In the course of that instruction I referred to this as a two passenger roadster. I do not recall whether the evidence showed that or not, so you will be controlled solely by the evidence on the question of whether it did show it was a two passenger roadster or not, and disregard that part of the court's last instruction that referred to it as a two passenger roadster, unless that conforms to your recollection of the evidence.

The owner of an automobile who rides in it while it is driven by another, is answerable for the negligence of the driver, and if Wilson M. Slocomb was the owner, and if you find in this case that the driver of the automobile was negligent, and that his negligence in any degree was a contributing cause of this collision, then I charge you the plaintiff is not entitled to recover, and your verdict should be for the defendant.

In determining the ownership of this automobile, you may consider any application that was made for a license,—I will go back further than that. The law further provides that upon the sale or transfer of title of any motor vehicle, the seller or person who is conveying his interest therein, must remove

his number plates therefrom. In determining the ownership of this automobile, you may consider any application that was made for a license, also any and all other facts and circumstances which tend to prove the ownership thereof. [210]

Even a passenger in an automobile, of which he is not the owner, is obliged to use some degree of care for his own safety. It is his duty to look for an approaching train, and if he sees one, or in the exercise of ordinary care, would have seen one coming, and failed to give any warning to the driver, when an ordinarily careful and prudent man placed in similar circumstances would have done so in time to have prevented the collision, he is guilty of contributory negligence, which will bar a recovery for his death.

If you believe that the son Cecil was driving the car, then in deciding the question of whether deceased, Wilson M. Slocomb, was negligent, you should consider not only the fact that the deceased was the owner of the car, but also the relation of father and son, and the age of Cecil, and determine under these circumstances whether the deceased was negligent in any degree contributing to the proximate cause of the accident.

If you believe from the evidence in this case that at the time of the collision the automobile was driven by someone other than the deceased, Wilson M. Slocomb, then I instruct you that a person riding as a passenger in an automobile, at a point where the highway crosses the railroad track, is required to exercise the same care, in so far as it is practicable

for him to do so, to protect himself from injury, that he would if he were doing the driving. He cannot rely wholly upon the driver exercising the proper degree of care to protect him from injury, and exercise no care himself. Thus, if the deceased knew, or in the exercise of ordinary care would have known that the automobile in which he was riding was approaching and about to cross [211] railroad tracks upon which trains passed at any time, and was traveling at a speed which would render it impossible to stop or otherwise avoid a collision, if a train passed along the tracks as the automobile passed across them, and that the driver of the automobile was not checking or reducing the speed, and apparently was not looking out for trains which might be passing along the tracks, then it was deceased's duty to make a reasonable effort to ascertain whether a train was approaching and warn the driver of the automobile that they were about to cross railroad tracks, and to endeavor to induce to check or slacken the speed until it could be ascertained whether a train was approaching and it was safe to cross the tracks.

If you find from the evidence that deceased made no effort to look out for danger or protect himself against it, when an ordinarily prudent man would have done so, and in consequence the automobile collided with the train, whereby the deceased was killed, then I charge you that deceased was guilty of negligence which contributed to his own death, and the plaintiff is not entitled to recover damages therefor. You are further instructed that the duty

owed by deceased as a passenger in the automobile is in addition to that owed by him as owner of the car. Well, I would hardly say, in addition. That assumes he was the owner of the car, and that is one of the facts for you to try. But the duty he owed himself as a passenger existed independently, at least, of his responsibility as owner of the car. As owner of the automobile, deceased was answerable for the negligence of the driver, and no matter by whom said automobile was driven, if the driver was negligent in approaching the crossing, and, but for that negligence, this [212] collision would not have occurred, then plaintiff cannot recover, even though defendant was also negligent.

Even though you should find from the evidence that the speed of the train was excessive, or that the engineer failed to give a warning of its approach, if such were the fact, it did not relieve the deceased, or the driver of the automobile, if a person other than the deceased, from the necessity of taking ordinary precautions for his own safety. That is, provided the driver was a person for whose action the deceased was responsible. Negligence of defendant in these particulars would be no excuse for negligence on the part of the occupants of the automobile. A motorist is bound to listen and to look before attempting to cross a railroad track, and not to drive carelessly into a place of possible danger, but to have his automobile under control, and to stop, if necessary. If, by using his senses of sight and hearing, deceased or

someone for whose negligence deceased is answerable, could have seen or heard the train in time to avoid a collision, but either failed to make use of his senses, and drove carelessly upon the track, or saw the train and negligently attempted to beat it across the crossing, or did not see the train, but could have seen it if he had looked and could have stopped and avoided the collision, in the exercise of reasonable and ordinary care, then the deceased was guilty of negligence contributing to his death, so as to deprive plaintiff of her right to recover.

I charge you that on November 27, 1919, it was the law in this State that in no case shall any motor vehicle be driven, operated, or moved at a rate of speed faster than twelve miles an hour at any crossing within the main, [213] thickly settled, or business portion of any city or town.

If you believe from the evidence that the automobile was proceeding across such a crossing at the time of the collision at a rate of speed in excess of 12 miles per hour, then I charge you that the driver of the automobile was guilty of negligence, and if you believe that the speed of the automobile contributed to the collision as one of the proximate causes, then your verdict must be for the defendant, even though you should believe that the defendant was also negligent.

You are instructed that it was the duty of the deceased, upon approaching said crossing, to have looked and listened at a point before crossing the track where he could see and hear an approaching train, and if he was driving the automobile, to have

it under such control, of if it was being driven by one for whose negligence he was answerable, as you are instructed herein, to cause the operator to have said automobile under such control.

You are further instructed if, upon approaching the tracks, deceased could not reasonably ascertain by looking and listening that he could cross in safety, then it was his duty to stop before attempting to cross the track, or, if the automobile was driven by one for whose negligence he was answerable, to cause said driver to stop said automobile, and to look and listen at a point where he could see and hear the approaching train. If you find from the evidence that the deceased did not look and listen upon approaching said track, at a point where he could see and hear, or that deceased did not cause the automobile to stop before crossing said track, when he could not cross in safety without doing so, and that his failure in this regard was [214] the proximate cause of the accident, such failure would be negligence on the part of the deceased, and plaintiff cannot recover herein and your verdict must be for the defendant.

Your verdict, if you find for plaintiff, must be confined solely to the pecuniary loss the widow has sustained by her husband's death.

I caution you that you are not to let any consideration of sympathy or other feelings of that sort enter into your verdict in any way, either as to whether it should be for the plaintiff or for the defendant, or, in case you should find for the plain-

tiff, as to the amount of it. While you should not allow anything to plaintiff for sorrow, grief, and pain, or for the mere loss of society of deceased, you should take into consideration, not only his earning capacity as an orchardist, based upon what was being paid at the time of his death, in the vicinity of deceased's ranch for the kind of services performed by him, independent of his income from invested capital or profits from the ranch, but also the care and attention which such a man would give to his wife, and the loss of his advice as a husband, which the plaintiff has suffered by his death.

Plaintiff is entitled to be compensated only for the substantial and material benefits which she would have received from the deceased if he had lived, and which she has lost by his death. That includes whatever support she would have received from him, and the net earnings which he would have earned and ultimately applied to her benefit, and the loss of his care and advice as a husband.

Now, in that instruction I told you that you would not allow plaintiff anything for sorrow, grief, pain, [215] or for the mere loss of the society of the deceased. You will disregard that part of the instruction wherein I told you you would not allow plaintiff anything for the loss of his society.

The attorney for the plaintiff, in his final argument, told you that you would have a right to take into consideration the delay that might occur before Congress made an appropriation to pay any

verdict or judgment that was rendered in this case. The Court instructs you that he was wrong in that. Under the instructions I have given you, you are to determine the rule of damage that you are to follow is the pecuniary injury that resulted to the plaintiff by reason of defendant's negligence—if he was negligent—and that negligence caused deceased's death. You have no right whatever to speculate when Congress will take care of any judgment that may be rendered in this case.

You are, in this case, as in every case where questions of fact are submitted to you for your determination, the sole and exclusive judges of the weight of the evidence and the credibility of the witnesses.

In weighing the evidence, and in passing upon the credit that you determine the witnesses are entitled to, who have appeared before you and testified, you should take into account their appearance, manner and demeanor in giving their testimony, whether they testified frankly, freely, fairly and openly, just as you would expect someone to testify who was doing their best to tell the exact truth, or whether some of them may have been evasive and hesitating, giving you the impression they were trying to keep back something; whether some of them may not have been contradictory, whether some of them may not have been too willing, [216] and did not simply answer the questions they were asked, and quit, but kept on trying to get something into the case that they felt and

seemed to be anxious to tell, whether it was a fair answer to a fair question or not, and, also take into account the reasonableness and probability of the testimony of each witness by itself in view of all the circumstances, situations and conditions; you should take into account whether the testimony of a witness has been corroborated where you would expect it to be corroborated if it were true, or whether it has been contradicted by other evidence in the case; also take into account the interest any witness may have been shown to have in the case, either in the conduct or manner of giving his or her testimony, or by the relation of the witness to the case.

The plaintiff has taken the stand in her own behalf, and you will apply to her testimony the same rules you do to the testimony of the other witnesses, including her natural interest in the result of the case.

The COURT.—Anything further, gentlemen, before the jury retires?

Mr. MATTHIAS.—You have not told them the number required to reach a verdict.

The COURT.—Some of you may have sat in the State court. In the State court, I believe, ten jurors may return a verdict in a civil case. In this court, even in a civil case, it requires the full twelve of your number to join in a verdict in order to return it into court.

Defendant's Exceptions to the Court's Instructions to the Jury and to the Court's Refusal to Give Defendant's Requested Instructions.

Mr. MATTHIAS.—Before the jury retires, and when [217] your Honor is through, I wish to take my exceptions as the law requires.

The COURT.—Well, you may take them now.

Mr. MATTHIAS.—Then, as the law requires, and before the jury retires to consider its verdict, I wish to except to that part of the instructions given by the Court in which the jury is instructed that it is the duty of the defendant to sound the bell or blow the whistle eighty rods from the crossing, and continue to do so until the crossing is reached, upon the ground it is not an issue in the case.

I also wish to except to that part of the instructions given to the effect that the train must make every reasonable effort to stop if the automobile is unavoidably in the way, on the ground that it is not an issue in this case, and it raises the question of the last clear chance rule which is not in the case.

I wish to except to that part of the instructions which reads in words or substance, that the driver of an automobile is entitled to act on the assumption that the train will do its duty in regard to giving signals, on the ground that it is not applicable to the facts and the evidence in this case.

The defendant also wishes to except to that part of the instructions in words or substance, if the

deceased was guilty of no contributory negligence and he had no control over the driver of the car, and the driver was not responsible to him, and the car did not belong to the deceased, and the collision was the result of concurring negligence of defendant and other parties over whom the deceased had no control, that then plaintiff is entitled to recover, upon the ground that under the evidence in this [218] case, it has been proved that the deceased was the owner of the car, and the jury should have been so instructed.

I desire to except to the refusal of the Court to give defendant's requested instruction No. 1.

I desire to except to the refusal of the Court to give defendant's requested instruction No. 2.

I desire to except to the refusal of the Court to give the first part of defendant's requested instruction No. 3, commencing with the words, "It is not the law in the State of Washington," and ending with the words, "and the commission may order any change that it may deem advisable."

I desire to except to the Court's refusal to give defendant's requested instruction No. 11, commencing with the words: "should you believe from the evidence that the deceased knew," and ending with the words, "or in any of the other ways alleged in the complaint."

I desire to except to the refusal of the Court to give defendant's requested instruction No. 12, beginning with the words: "Even though the jury believe the train was running at a fast rate of

speed," and ending with the words, "and your verdict must be for the defendant."

I desire to except to the refusal of the Court to give defendant's requested Instruction No. 13, commencing with the words: "You are instructed that the deceased, Wilson M. Slocomb," and ending with the words, "but as father of the boy who was doing the driving."

I desire to except to the refusal of the Court to give defendant's requested Instruction 13A commencing with the words, "You are instructed that it is conclusively presumed," and ending with the words, "your verdict should be for the defendant." [219]

Defendant excepts to the refusal of the Court to give defendant's requested instruction 13B, and each and every part thereof, beginning with the words: "You are instructed that an automobile is personal property," and ending with the words, "and you must disregard the evidence of the alleged ownership by Cecil."

Defendant excepts to the refusal of the Court to give defendant's requested instruction 14, commencing with the words: "You are instructed that not only would deceased be answerable," and ending with the words, "but would likewise be answerable for his own negligence." Also that part of requested Instruction 14, beginning with the words: "If you believe from the evidence that the son Cecil was driving the car," and ending with the words, "your verdict should be for the defendant."

Defendant excepts to the refusal of the Court to give defendant's requested instruction 14A, commencing with the words, "You are instructed if you believe from the evidence," and ending with the words, "and your verdict should be for the defendant."

Defendant excepts to the refusal of the Court to give that part of defendant's requested instruction No. 15, beginning with the words, "In this connection, if you believe from this evidence," and ending with the words, "and the plaintiff is not entitled to recover damages therefor." Defendant excepts also to the giving by the Court in connection with that part of the instruction which the Court gave,—excepts to the Court's instruction to the jury to the effect that whether Mr. Slocomb was the owner of the car was one of the facts for the jury to try, on the ground that it is not an issue for the jury to try, but that [220] the jury should have been instructed that the car belonged to Mr. Slocomb.

The defendant excepts to the refusal of the Court to give that part of Instruction No. 16, beginning with the words, "Even though you should find from the evidence that the speed of the train was excessive," and ending with the words, "so as to deprive plaintiff of her right to recover." And the defendant excepts to the instruction as given substantially worded as defendant's requested Instruction 16, with the further provision in the instruction that the jury was to further take into consideration if the driver was one for whose negligence deceased was answerable, on the ground that the jury should

have been instructed that the deceased was answerable for the negligence of the driver of the automobile, and that it was proven in this case.

The defendant excepts to the refusal of the Court to give the first paragraph of defendant's requested Instruction 18, beginning with the words, "You are instructed if you find that the deceased," and ending with the words, "regardless of whether or not he or his servants were also negligent."

Defendant excepts to the refusal of the Court to give defendant's requested Instruction No. 19, beginning with the words, "the duty of a person to look and listen before crossing a railroad," and ending with the words, "then deceased was guilty of contributory negligence, and your verdict must be for the defendant."

Defendant excepts to the refusal of the Court to give defendant's requested Instruction 20, beginning with the words, "You are instructed, if, after passing the boxcars standing on the industry track," and ending [221] with the words, "and if you so find, your verdict should be for the defendant."

Defendant excepts to the refusal of the Court to give defendant's requested instruction 21, beginning with the words, "You are instructed if, after passing the boxcars standing on the industry track," and ending with the words, "if you so find, your verdict must be for the defendant."

The defendant excepts to the refusal of the Court to give defendant's requested instruction 22, beginning with the words, "The attorneys for each party

in this action have the right to talk with their respective witnesses," and ending with the words, "the place of residence of such witnesses to and from the place of trial."

The defendant excepts to the refusal of the Court to give that part of defendant's requested instruction No. 23, which was not given, beginning with the words, "The plaintiff is not entitled to recover anything for loss of profits," and ending with the words, "Likewise, the plaintiff is not entitled in this case to recover anything for the death of her son."

The defendant excepts to the refusal of the Court to give each and all of the said instructions and each and every part thereof.

The COURT.—The defendant is allowed exceptions to any refusal to give requested instructions made by the defendant, and the plaintiff is allowed exceptions to any refusal to instruct as requested by plaintiff, and other exceptions are denied and disallowed because it is not pointed out wherein they are not correctly stated in the instructions, making an exception as far as both parties [222] are concerned to this instruction which the Court gave, and I will modify it: The Court instructed you as follows in reading the instructions to you: "The train has the preference right of way, but it is bound to give due warning of its approach, so that the automobile may stop and allow it to pass." Now this part, I am going to modify that as follows: "And to use every exertion to stop if the automobile is unavoidably in the way." Now,

regarding that part of the instructions, Gentlemen, according to the Court's recollection, there was some witness who testified about this automobile being momentarily stalled on the track. I have forgotten what witness it was; if you do not recall that evidence, and do not find that the automobile was stalled momentarily or otherwise on the track, then that part of the instruction that I read to you, "to use every exertion to stop if the automobile was unavoidably in the way," you will disregard it, because it is obvious that an automobile, as I instructed you, if there was nothing in the situation to warn the engineer that the driver of the automobile was not going to keep out of the way, why, he could keep his speed.

Mr. MARTIN.—I call the Court's attention to the engineer's testimony, himself, which was to the effect—

Mr. MATTHIAS.—I object to counsel arguing the question.

The COURT.—I am leaving the question of fact to the jury. There is a rule,—arising from cases where automobiles have been stalled on the track, and which has sometimes been applied where a man intoxicated or otherwise not at himself, is lying on the track, and the train is coming, and the engineer sees that condition, why, then [223] it is his duty to use every reasonable effort to stop, because there is something in the situation to show there is a party that is helpless temporarily or momentarily, and to stop his train; but, until some situation arises to warn the engineer that such a

condition exists, why he may keep on his speed assuming that the party shows no evidence of his inability to avoid the train,—and to keep on with the presumption he will do so.

The form of verdict, Gentlemen, reads,—the one in favor of the defendant simply reads, "We, the jury, in the above-entitled cause find for the defendant." If you find for the defendant, that would simply require the signature of your foreman. The other one reads, "We the jury in the above-entitled cause find for the plaintiff herein, and assess her damages in the sum of blank dollars." That not only requires the signature of the foreman, but you must insert in the blank the amount at which you fix her recovery.

Gentlemen, do you agree to a sealed verdict?

Mr. MATTHIAS.—Yes.

Mr. MARTIN.—Yes.

The COURT.—In case you agree after five o'clock, why, when you have reached your verdict, you will advise your bailiff who has you in charge and he will furnish you with an envelope; you will place your verdict in this envelope, seal it up, and your foreman will keep it during the night. You may then separate and meet here at 10 o'clock tomorrow morning to answer to your verdict. Anything further before the jury retires? You may retire, Gentlemen, and the Court will be at recess ten minutes. [224]

Recital Re Verdict.

Thereafter, the jury having received the charge of the Court, retired to consider of its verdict, and

thereafter returned into the above court with a verdict in favor of the plaintiff for damages against the defendant in the sum of thirteen thousand seven hundred and fifty dollars ($13,750).

Now, in furtherance of justice and that right may be done, defendant presents the foregoing as its bill of exceptions in this cause, and prays that the original exhibits on file with the Clerk of this court be attached hereto and made a part hereof, and that the foregoing may be settled, allowed, signed and ratified by the Judge as provided by law, and filed as a bill of exceptions herein.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant.

We hereby acknowledge service of the foregoing bill of exceptions and the recipt of a true copy thereof, this 31st day of August, 1922.

WM. MARTIN,
H. A. MARTIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 31, 1922. F. M. Harshberger, Clerk.

Refiled in the United States District Court, Western District of Washington, Northern Division, as settled, Nov. 6, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [225]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Order Settling Bill of Exceptions and Certificate to Bill of Exceptions.

Now, on this 6th day of November, 1922, the above cause coming on for hearing, on the application of the defendant to settle the bill of exceptions in said cause, defendant appearing by Edwin C. Matthias, his attorney, and the plaintiff appearing by William Martin, her attorney, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by law, and that no amendments have been suggested thereto; plaintiff's motion to strike the bill having been submitted to the Court, the Court thereafter fixed this 6th day of November for the settlement of

the bill of exceptions, and that plaintiff's objections and exceptions to defendant's proposed bill of exceptions and plaintiff's motion to strike defendant's proposed bill of exceptions have been overruled and denied, and that the time for settling and filing said bill of exceptions has not expired; and it further appearing to the Court that said bill of exceptions contains all the material evidence and facts occurring in the trial of said cause, together with exceptions thereto, and it further appearing to the Court that the entire charge of the Court to the jury is included in said bill of exceptions, [226] together with all of defendant's requested instructions and all exceptions taken by the defendant to the Court's charge to the jury and to the Court's failure to charge as requested by the defendant, and it also appearing to the Court that there is included in said bill of exceptions all the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions, and the Clerk of this court is hereby ordered and instructed to attach the same thereto.

Therefore, upon the motion of Edwin C. Matthias, attorney for the defendant,—

IT IS HEREBY ORDERED, that said proposed bill of exceptions be, and the same is hereby settled as the true bill of exceptions in said cause, and the same is hereby certified to contain all the material evidence and facts occurring in the trial of said cause, together with the exceptions thereto, and to contain the entire charge of the Court to the jury,

together with all of defendant's requested instructions and all exceptions taken by the defendant to the Court's charge to the jury, and to the Court's failure to charge as requested by the defendant, and the said bill of exceptions is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a full, true and correct bill of exceptions, and the said bill of exceptions having been filed when lodged with the Clerk, the Clerk of this court is hereby authorized and ordered to again file the same as a record in said cause, and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 6th day of November, 1922.

EDWARD E. CUSHMAN,
Judge. [227]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 6, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [228]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Motion for Order Directing Original Exhibits to be Forwarded to the Circuit Court of Appeals.

Comes now the defendant above named and moves the Court for an order directing the Clerk of the above-named court to forward to the Circuit Court of Appeals for the Ninth Circuit all of the original exhibits heretofore introduced in evidence at the trial of this cause to wit: Plaintiff's Exhibits 1 to 20, inclusive, and Defendant's Exhibits "A" to "R," inclusive, and for an order directing that said exhibits need not be printed.

This motion is based upon the affidavit of E. C. Matthias, attached hereto and hereby made a part hereof.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant. [229]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Petition for Writ of Error.

Comes now the above-named defendant, by his attorneys, and complains that in the record and proceedings had in said cause, and also in the rendition of the judgment in the above-entitled cause in the said District Court of the United States for the Western District of Washington, Northern Division, against said defendant, on the 5th day of June, 1922, manifest error hath happened, to the great damage of said defendant.

WHEREFORE, said defendant prays for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in

that behalf made and provided, and also that an order be made fixing the amount of the appeal bond which the defendant shall give and furnish upon said writ of error.

Dated this 20th day of November, 1922.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant. [232]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [233]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Assignment of Errors, and Prayer for Reversal.

Comes now the defendant, James Cox Davis, as

Director General of Railroads and Agent of the United States of America under the Transportation Act of 1920, and files the following assignment of errors, upon which he will rely upon his prosecution of his writ of error in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit for relief from the judgment rendered in said cause.

I.

The District Court of the United States for the Western District of Washington, Northern Division, erred in overruling the motion made by the defendant for a nonsuit at the close of plaintiff's case, to which order of the Court the defendant excepted, which exception was duly allowed by the Court.

II.

The said Court erred in denying defendant's challenge to the sufficiency of the evidence, and in overruling the motion of defendant for judgment and for a directed verdict in his favor at the close of all the evidence in the case, upon the ground and [234] for the reason that the evidence proved, as a matter of law, that the death of Wilson M. Slocomb was caused by the negligent acts and omissions of said Wilson M. Slocomb, either alone or combined with the negligent acts and omissions of Wilson M. Slocomb's minor son Cecil Slocomb, and Wilson M. Slocomb's employee, Glen Long, for the negligence of both of whom the deceased, Wilson M. Slocomb, as owner of the car was responsible.

III.

The said Court erred in instructing the jury as follows:

"If the deceased, Wilson M. Slocomb, was guilty of no contributory negligence and he had no control over the driver of the car, and the driver of the car was in no way responsible to him, and the car did not belong to the deceased, and the collision was the result of concurring negligence of both the Railroad Company in the operation of its train, as complained of in the complaint, and the driver of the automobile, over whom the deceased had no control, and in a car in which he had no interest and exercised no control, the plaintiff would be entitled to recover."

To which instruction defendant excepted in open court, before the jury retired to consider of its verdict.

IV.

The said Court erred in instructing the jury as follows:

"You are further instructed that the duty owed by deceased as a passenger in the automobile is in addition to that owed by him as owner of the car. Well, I would hardly say in addition. That assumes he was the owner of the car, and that is one of the facts for you to try."

To which instruction defendant excepted in open court, before the jury retired to consider of its verdict.

V.

That said Court erred in instructing the jury as follows:

> "Even though you should find from the evidence that the speed of the train was excessive, or that the engineer failed to give a warning of its approach, if such were the facts, it did not relieve the deceased, or the driver of the automobile, if a person other than the deceased, from the necessity of taking ordinary precautions for his own safety; that is, provided the driver was a person for whose action the deceased was responsible." [235]

To which instruction defendant excepted in open court, before the jury retired to consider of its verdict.

VI.

The said Court erred in its refusal to give defendant's requested Instruction No. 1, reading as follows:

> "The jury is instructed to return a verdict for the defendant."

To the Court's refusal to give defendant's said requested Instruction No. 1, reading as above, defendant excepted, which exception was duly allowed.

VII.

The said Court erred in its refusal to give defendant's requested Instruction No. 13, reading as follows:

> "You are instructed that the deceased, Wilson M. Slocomb, was the owner of the automo-

bile, and that it is wholly immaterial, so far as this case is concerned, by whom the automobile was driven at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should consider the deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving."

To the Court's refusal to give defendant's said requested Instruction No. 13, reading as above, defendant excepted, which exception was duly allowed.

VIII.

The said Court erred in its refusal to give defendant's requested Instruction No. 13a, reading as follows:

"You are instructed that it is conclusively presumed that the deceased, Wilson M. Slocomb, was the owner of the automobile. You need not concern yourselves with the question as to who was driving the automobile at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should consider deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving. The deceased was an occupant of the automobile, and whether it was driven by him or by some other person, he is answerable for the negligence of the driver. [236]

If you find in this case that the driver of the automobile, no matter by whom it was

driven, was negligent, and that his negligence contributed in any degree as a proximate cause to the collision, then I charge you that plaintiff is not entitled to recover, and your verdict should be for the defendant."

To the Court's refusal to give defendant's said requested Instruction No. 13a, reading as above, defendant excepted, which exception was duly allowed.

IX.

The said Court erred in its refusal to give defendant's requested Instruction No. 13b, reading as follows:

"You are instructed that an automobile is personal property, and that the law presumes that personal property in the possession of a mature man is his own, and the burden of proving that this automobile was the property of the son, Cecil Slocomb, is on the plaintiff.

In this connection you are instructed that the laws of the State of Washington provide that an application for a motor vehicle license must show the name of the owner of the automobile, with the business or residence address thereof, or both, if there be such, and that such application shall be made to the County Auditor by the owner of the vehicle, or his duly authorized agent, over the signature of such owner or agent, and that he shall certify on oath that statements therein are true to the best of his knowledge. The law also provides that no license shall be transferred from

one person to another person, and if there is a transfer of the title to an automobile, before the new owner is entitled to operate it he must take out a new license.

The law further provides that upon the sale or transfer of title of any motor vehicle, the seller or person who is conveying his interest therein, must remove his number plates therefrom, and delivery of the automobile or a change of ownership will not be deemed to have been made until the seller or party conveying his interest, has removed the number plates.

In determining the ownership of this automobile, you may consider any application that was made for a license, also any and all other facts and circumstances which tend to prove the ownership thereof. You should also consider whether deceased removed his number plates before he gave the automobile to his son, Cecil, if you believe that he did give it to Cecil, and if you find that he did not remove his number plates then I instruct you that it will be conclusively presumed that the deceased was the owner of the automobile at the time of the accident, and you must disregard the evidence of the alleged ownership by Cecil." [237]

To the Court's refusal to give defendant's said requested instruction No. 1[illegible], reading as above, defendant excepted, which exception was duly allowed.

X.

The said Court erred in its refusal to give defendant's requested Instruction No. 14, reading as follows:

> "If you believe from the evidence that the son Cecil was driving the car, and that he was guilty of negligence which contributed in any degree as a proximate cause of the collision, or that the deceased, Wilson M. Slocomb, was guilty of negligence, either as driver of the car or as a passenger, while his son Cecil or Glen Long was driving the car, which in any degree contributed as a proximate cause to the collision, then I charge you the plaintiff cannot recover, and your verdict should be for the defendant."

To the Court's refusal to give defendant's requested Instruction No. 14, reading as above, defendant excepted, which exception was duly allowed.

XI.

The said Court erred in its refusal to give defendant's requested Instruction No. 21, reading as follows:

> "You are instructed if, after passing the boxcars standing on the industry track, the approaching train was in full view of the occupants of the automobile, if they looked in that direction, and if you further find at that time the automobile was traveling at a rate of speed which would have enabled the driver of the automobile to stop or turn aside, and avoid a collision with the train, if he had looked in the

direction of the train and seen it approaching, then in that event the driver of the automobile was guilty of negligence, and deceased, Wilson M. Slocomb, as owner of the automobile, was responsible for the said negligence of the driver, and, if you so find, your verdict should be for the defendant."

To the Court's refusal to give defendant's requested Instruction No. 21, reading as above, defendant excepted, which exception was duly allowed.

WHEREFORE, the said defendant and plaintiff in error prays that the judgment of the District Court of the United States for the Western District of Washington, Northern Division, [238] be reversed, and that such directions be given that full force and efficacy may inure to defendant by reason of his defense to said cause.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Defendant and Plaintiff in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [239]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, James Cox Davis, as Director General of Railroads and Agent of the United States of America under the Transportation Act of 1920, as principal, and National Surety Company, as surety, are held and firmly bound unto Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, Deceased, the plaintiff above named, in the sum of $1,000.00 (One Thousand), to be paid to the said Marion C. Slocomb as Administratrix of the Estate of Wilson M. Slocomb, deceased, her successors or assigns, for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors and assigns, firmly by these presents.

The condition of this obligation is that,

WHEREAS, the above-named defendant, James Cox Davis, as Director General of Railroads and Agent of the United States of America under the Transportation Act of 1920, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled [240] cause, entered by the United States District Court for the Western District of Washington, Northern Division.

NOW, THEREFORE, if the above-named James Cox Davis, as Director General of Railroads and Agent of the United States of America under the Transportation Act of 1920, shall prosecute said writ of error to effect, and shall answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

Sealed with our seals and dated this 20th day of November, 1922.

JAMES COX DAVIS,
As Director General of Railroads and
Agent of the United States of America
Under the Transportation Act of 1920,
By EDWIN C. MATTHIAS,
His Attorney.

NATIONAL SURETY COMPANY,
By R. W. WHYTE,
Resident Vice-President.

[Seal] J. GRANT,
Resident Assistant Secretary.

Bond not being required by the Court but plaintiff in error requesting the approval of this bond,

The foregoing bond on writ of error approved this 20th day of November, 1922.

EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western District of Washington, Northern Division.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [241]

In the United States District Court, for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Order for the Forwarding of Original Exhibits to Circuit Court of Appeals of Ninth Circuit.

This matter coming on for hearing before the

Court on the motion of the defendant for an order directing the Clerk of this Court to forward to the Circuit Court of Appeals of the Ninth Circuit all the original exhibits introduced in evidence at the trial of this cause, and the Court being fully advised in the premises, and it having been shown to the Court that all of the exhibits introduced at said trial were marked 1 to 20, inclusive, on behalf of the plaintiff, and "A" to "R," inclusive, on behalf of the defendant;

IT IS HEREBY ORDERED that the Clerk be, and he is hereby directed to forward to the Circuit Court of Appeals of the Ninth Circuit, for the inspection of that Court on the appeal of this case all of the original exhibits introduced at the trial of this cause, which includes Plaintiff's Exhibits 1 to 20, inclusive, and Defendant's Exhibits "A" to "R," inclusive, and it is ordered that said exhibits need not be printed.

Done in open court this 20th day of November, 1922.

EDWARD E. CUSHMAN,
Judge. [242]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [243]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Order Allowing Writ of Error.

Upon the motion of Thomas Balmer and Edwin C. Matthias, attorneys for the defendant, a petition for a writ of error and an assignment of errors having been duly filed in the above-entitled cause,—

IT IS HEREBY ORDERED, that a writ of error be and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein.

Done in open court this 20th day of November, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Nov. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [244]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court, GREETING:

Please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to the writ of error heretofore issued in said cause, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Complaint.
2. Summons with return of service.

3. Appearance of attorneys for plaintiff.
4. Petition for removal.
5. Appearance of attorneys for defendant.
6. Notice of presentation of petition for removal.
7. Bond for removal.
8. Order removing cause to the United States District Court.
9. Demurrer of Great Northern Railway Company.
10. Order sustaining demurrer of Great Northern Railway Company.
11. Answer of James Cox Davis.
12. Reply.
13. Order permitting complaint to be amended by interlineation.
14. Verdict.
15. Petition for new trial.
16. Order denying petition for new trial.
17. Judgment. [245]
18. Motion for extension of time to file bill of exceptions.
19. Order granting extension of time to file bill of exceptions.
20. Bill of exceptions.
21. Order settling bill of exceptions.
22. Plaintiff's Exhibit 1.
23. Plaintiff's Exhibit 2.
24. Plaintiff's Exhibit 3.
25. Plaintiff's Exhibit 4.
26. Plaintiff's Exhibit 5.
27. Plaintiff's Exhibit 6.
28. Plaintiff's Exhibit 7.

29. Plaintiff's Exhibit 8.
30. Plaintiff's Exhibit 9.
31. Plaintiff's Exhibit 10.
32. Plaintiff's Exhibit 11.
33. Plaintiff's Exhibit 12.
34. Plaintiff's Exhibit 13.
35. Plaintiff's Exhibit 14.
36. Plaintiff's Exhibit 15.
37. Plaintiff's Exhibit 16.
38. Plaintiff's Exhibit 17.
39. Plaintiff's Exhibit 18 (also Plaintiff's Exhibits 19 and 20).
40. Defendant's Exhibit "A."
41. Defendant's Exhibit "B."
42. Defendant's Exhibit "C."
43. Defendant's Exhibit "D."
44. Defendant's Exhibit "E."
45. Defendant's Exhibit "F."
46. Defendant's Exhibit "G."
47. Defendant's Exhibit "H."
48. Defendant's Exhibit "I."
49. Defendant's Exhibit "J."
50. Defendant's Exhibit "K."
51. Defendant's Exhibit "L."
52. Defendant's Exhibit "M."
53. Defendant's Exhibit "N."
54. Defendant's Exhibit "O."
55. Defendant's Exhibit "P."
56. Defendant's Exhibit "Q."
57. Defendant's Exhibit "R."
58. Motion and affidavit for original exhibits to be sent up.

59. Order for original exhibits to be sent up.
60. Petition for writ of error.
61. Assignment of errors and prayer for reversal.
62. Order allowing writ of error.
63. Bond on writ of error.
64. (Original) writ of error.
65. (Original) citation and return of service.
66. This praecipe.

Said transcript to be prepared as required by law and the rules of this court and of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on or about the 19th day of December, 1922, or within thirty days from the date hereof. [246]

Dated at Seattle, Washington, this 20th day of November, 1922.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Plaintiff in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [247]

In the United States District Court of the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Plaintiff,

vs.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 247, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein from the

judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges, incurred and paid in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [248]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 679 folios at 15c	$101.85
Certificate of Clerk to transcript of record, 4 folios at 15c	.60
Seal to said certificate	.20
Certificate of Clerk to original exhibits, 3 fo. at 15c	.45
Seal to said certificate	.20

I hereby certify that the above cost for preparing and certifying record, amounting to $103.30, has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District this 6th day of December, 1922.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [249]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Plaintiff in Error.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable, the Judges of the United States District Court for the Western District of Washington, Northern Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court for the Western District of Washington, Northern Division, before you or some of you, between Marion C. Slocomb, as administratrix of the estate of Wilson M. Slocomb, deceased, as plaintiff (defendant in error), and James Cox Davis, as Director General of Railroads and Agent of the United States of

America under the Transportation Act of 1920, as defendant (plaintiff in error), manifest error hath happened, to the great damage of the said James Cox Davis, as Director General of Railroads and Agent of the United States of America under the Transportation Act of 1920, plaintiff in error, as by his complaint appears. [250]

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 20th day of November, in the year of our Lord, 1922.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington. [251]

[Endorsed]: No. 6210. In the United States District Court for the Western District of Washington, Northern Division. Marion C. Slocomb, as Admx., vs. James Cox Davis, as Director General, etc. Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [251½]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6210.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error,

vs.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Plaintiff in Error.

Citation.

United States of America,—ss.

The President of the United States to Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, Deceased, and to Messrs. H. A. Martin and William Martin, Her Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the State of California, within thirty days from the date of this writ, pursuant to writ of error filed in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein James Cox Davis, as the agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf. [252]

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 20th day of Nov. 1922.

EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western District of Washington, Northern Division.

[Seal] Attest: F. M. HARSHBERGER,
Clerk. [253]

We hereby acknowledge service of the foregoing citation, and the receipt of a true copy thereof, this 20th day of November, 1922.

WM. MARTIN and
H. A. MARTIN,
Attorneys for Defendant in Error.

[Endorsed]: No. 6210. In the United States District Court for the Western District of Washington, Northern Division. Marion C. Slocomb, as Admx., vs. James Cox Davis, as Director General of Railroads, etc. Citation. Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 3950. United States Circuit Court of Appeals for the Ninth Circuit. James Cox Davis, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed December 9, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

JAMES COX DAVIS, as Director General of Railroads and Agent of the United States of America Under the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error.

Statement of Errors on Which Plaintiff in Error Intends to Rely and of the Parts of the Record Which Plaintiff in Error Thinks Necessary for the Consideration of Said Errors.

Comes now the plaintiff in error above named and files herewith and causes to be served upon defendant in error above named the within statement of errors on which plaintiff in error intends to rely for a reversal of the judgment entered in the District Court of the United States for the Western District of Washington, and of the parts of the record which plaintiff in error thinks necessary for the consideration of said errors.

ERROR No. I.

The District Court of the United States for the Western District of Washington, Northern Divi-

sion, erred in overruling the motion made by plaintiff in error for a nonsuit at the close of defendant in error's case, to which order of the Court the plaintiff in error excepted, which exception was duly allowed by the Court; appearing at page 234 of original certified record.

ERROR No. II.

The said Court erred in denying plaintiff in error's challenge to the sufficiency of the evidence, and in overruling the motion of plaintiff in error for judgment and for a directed verdict in his favor at the close of all the evidence in the case, upon the ground and for the reason that the evidence proved, as a matter of law, that the death of Wilson M. Slocomb was caused by the negligent acts and omissions of said Wilson M. Slocomb, either alone or combined with the negligent acts and omissions of Wilson M. Slocomb's minor son, Cecil Slocomb, and Wilson M. Slocomb's employee, Glen Long, for the negligence of both of whom the deceased, Wilson M. Slocomb, as owner of the car was responsible; appearing at page 234 of original certified record.

ERROR No. III.

The said Court erred in instructing the jury as follows:

> "If the deceased, Wilson M. Slocomb, was guilty of no contributory negligence and he had no control over the driver of the car, and the driver of the car was in no way responsible to him, and the car did not belong to the deceased, and the collision was the result of con-

curring negligence, of both the Railroad Company in the operation of its train, as complained of in the complaint, and the driver of the automobile, over whom the deceased had no control, and in a car in which he had no interest and exercised no control, the plaintiff would be entitled to recover."

To which instruction plaintiff in error excepted in open court, before the jury retired to consider of its verdict; appearing at page 235 of original certified record.

ERROR No. IV.

The said Court erred in instructing the jury as follows:

"You are further instructed that the duty owed by deceased as a passenger in the automobile is in addition to that owed by him as owner of the car. Well, I would hardly say in addition. That assumes he was the owner of the car, and that is one of the facts for you to try."

To which instruction plaintiff in error excepted in open court, before the jury retired to consider of its verdict; appearing at page 235 of original certified record.

ERROR No. V.

The said Court erred in instructing the jury as follows:

"Even though you should find from the evidence that the speed of the train was excessive, or that the engineer failed to give a warning of its approach, if such were the fact, it did not

relieve the deceased, or the driver of the automobile, if a person other than the deceased, from the necessity of taking ordinary precautions for his own safety; that is, provided the driver was a person for whose action the deceased was responsible."

To which instruction plaintiff in error excepted in open court, before the jury retired to consider of its verdict; appearing at page 235 of original certified record.

ERROR No. VI.

The said Court erred in its refusal to give plaintiff in error's requested Instruction No. 1, reading as follows:

"The jury is instructed to return a verdict for the defendant."

To the Court's refusal to give plaintiff in error's said requested Instruction No. 1, reading as above, plaintiff in error excepted, which exception was duly allowed; appearing at page 236 of original certified record.

ERROR No. VII.

The Court erred in its refusal to give plaintiff in error's requested Instruction No. 13, reading as follows:

"You are instructed that the deceased, Wilson M. Slocomb, was the owner of the automobile, and that it is wholly immaterial, so far as this case is concerned, by whom the automobile was driven at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should

consider the deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving."

To the Court's refusal to give plaintiff in error's said reguested Instruction No. 13, reading as above, plaintiff in error excepted, which exception was duly allowed; appearing at page 236 of original certified record.

ERROR No. VIII.

The said Court erred in its refusal to give plaintiff in error's requested Instruction No. 13a, reading as follows:

"You are instructed that it is conclusively presumed that the deceased, Wilson M. Slocomb, was the owner of the automobile. You need not concern yourselves with the question as to who was driving the automobile at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should consider deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving. The deceased was an occupant of the automobile, and whether it was driven by him or by some other person, he is answerable for the negligence of the driver.

If you find in this case that the driver of the automobile, no matter by whom it was driven, was negligent, and that his negligence contributed in any degree as a proximate cause to the collision, then I charge you that plaintiff

is not entitled to recover, and your verdict should be for the defendant."

To the Court's refusal to give plaintiff in error's said requested Instruction No. 13a, reading as above, plaintiff in error excepted, which exception was duly allowed; appearing at page 236 of original certified record.

ERROR No. IX.

The said Court erred in its refusal to give plaintiff in error's requested Instruction No. 13b, reading as follows:

"You are instructed that an automobile is personal property, and that the law presumes that personal property in the possession of a mature man is his own, and the burden of proving that this automobile was the property of the son, Cecil Slocomb, is on the plaintiff.

In this connection you are instructed that the laws of the State of Washington provide that an application for a motor vehicle license must show the name of the owner of the automobile, with the business or residence address thereof, or both, if there be such, and that such application shall be made to the County Auditor by the owner of the vehicle, or his duly authorized agent, over the signature of such owner or agent, and that he shall certify on oath that statements therein are true to the best of his knowledge. The law also provides that no license shall be transferred from one person to another person, and if there is a transfer of the title to an automobile, before the new

owner is entitled to operate it he must take out a new license.

The law further provides that upon the sale or transfer of title of any motor vehicle, the seller or person who is conveying his interest therein, must remove his number plates therefrom, and delivery of the automobile or a change of ownership will not be deemed to have been made until the seller or party conveying his interest, has removed the number plates.

In determining the ownership of this automobile, you may consider any application that was made for a license, also any and all other facts and circumstances which tend to prove the ownership thereof. You should also consider whether deceased removed his number plates before he gave the automobile to his son, Cecil, if you believe that he did give it to Cecil, and if you find that he did not remove his number plates then I instruct you that it will be conclusively presumed that the deceased was the owner of the automobile at the time of the accident, and you must disregard the evidence of the alleged ownership by Cecil."

To the Court's refusal to give plaintiff in error's said requested Instruction No. 13b, reading as above, plaintiff in error excepted, which exception was duly allowed; appearing at page 237 of original certified record.

ERROR No. X.

The said Court erred in its refusal to give plain-

tiff in error's requested Instruction No. 14, reading as follows:

> "If you believe from the evidence that the son Cecil was driving the car, and that he was guilty of negligence which contributed in any degree as a proximate cause of the collision, or that the deceased, Wilson M. Slocomb, was guilty of negligence, either as driver of the car or as a passenger, while his son Cecil or Glen Long was driving the car, which in any degree contributed as a proximate cause to the collision, then I charge you the plaintiff cannot recover, and your verdict should be for the defendant."

To the Court's refusal to give plaintiff in error's requested Instruction No. 14, reading as above, plaintiff in error excepted, which exception was duly allowed; appearing at page 238 of original certified record.

ERROR No. XI.

The said Court erred in its refusal to give plaintiff in error's requested Instruction No. 21, reading as follows:

> "You are instructed if, after passing the box-cars standing on the industry track, the approaching train was in full view of the occupants of the automobile, if they looked in that direction, and if you further find at that time the automobile was traveling at a rate of speed which would have enabled the driver of the automobile to stop or turn aside, and avoid a collision with the train, if he had looked in

the direction of the train and seen it approaching, then in that event the driver of the automobile was guilty of negligence, and deceased, Wilson M. Slocomb, as the owner of the automobile, was responsible for the said negligence of the driver, and if you so find, your verdict should be for the defendant."

To the Court's refusal to give plaintiff in error's requested Instruction No. 21, reading as above, plaintiff in error excepted, which exception was duly allowed; appearing at page 238 of original certified record.

The parts of the record which plaintiff in error thinks necessary for the consideration of the errors hereinbefore set forth, and the pages of the original certified record on which the parts of the record hereinafter enumerated will be found, are as follows:

1. Complaint appearing at page 2 of original certified record;
2. Summons with affidavit of service, appearing at page 11 of original certified record;
3. Appearance of attorneys for plaintiff, appearing at page 13 of original certified record;
4. Petition for removal, appearing at page 14 of original certified record;
5. Appearance of attorneys for defendant, appearing at page 19 of original certified record;
6. Notice of presentation of petition for removal, appearing at page 20 of original certified record;

7. Bond for removal, appearing at page 22 of original certified record;
8. Order removing cause to the United States District Court, appearing at page 25 of original certified record;
9. Demurrer of Great Northern Railway Company, appearing at page 27 of original certified record;
10. Order sustaining demurrer of Great Northern Railway Company, appearing at page 29 of original certified record;
11. Answer of James Cox Davis, appearing at page 30 of original certified record;
12. Reply, appearing at page 34 of original certified record;
13. Order permitting complaint to be amended by interlineation, appearing at page 36 of original certified record;
14. Verdict, appearing at page 37 of original certified record;
15. Petition for new trial, appearing at page 38 of original certified record;
16. Order denying petition for new trial, appearing at page 54 of original certified record;
17. Judgment, appearing at page 55 of original certified record;
18. Motion for extension of time to file bill of exceptions, appearing at page 57 of original certified record;
19. Order granting extension of time to file bill of exceptions, appearing at page 59 of original certified record;

20. Bill of exceptions, appearing at page 60 of original certified record;
21. Order settling bill of exceptions, appearing at page 226 of original certified record;
22. Motion and affidavit for original exhibits to be sent up, appearing at page 229 of original certified record;
23. Order for original exhibits to be sent up, appearing on page 242 of original certified record;
24. Petition for writ of error, appearing at page 232 of original certified record;
25. Assignment of errors and prayer for reversal, appearing at page 234 of original certified record;
26. Order allowing writ of error, appearing at page 244 of original certified record;
27. Bond on writ of error, appearing at page 240 of original certified record;
28. Original writ of error, appearing at page 250 of original certified record;
29. Original citation and acknowledgment of service, appearing at page 252 of original certified record;
30. Praecipe for transcript of record, appearing at page 245 of original certified record;
31. Certificate of the Clerk of the District Court of the United States for the Western District of Washington, to the certified record, appearing at page 248 of original certified record;

32. Certificate of the Clerk of the District Court of the United States for the Western District of Washington, attached to the original exhibits forwarded with the certified record, together with the original exhibits, including plaintiff's exhibits 1 to 20, inclusive, and defendant's exhibits "A" to "R," inclusive; the said exhibits, under order of the Court are not to be printed.

Dated at Seattle, Washington, this 6th day of December, 1922.

THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Plaintiff in Error.

Service of the within and foregoing statement of errors on which plaintiff in error intends to rely and of the parts of the record which plaintiff in error thinks necessary for the consideration of said errors, acknowledged by receipt of a copy thereof this 6th day of December, 1922.

WM. MARTIN,
H. A. MARTIN,
Attorneys for Defendant in Error.

[Endorsed]: No. 3950. In the United States Circuit Court of Appeals for the Ninth Circuit. James Cox Davis, as Director General of Railroads of the United States of America Under the Transportation Act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, Deceased, Defendant in Error. Statement of Errors on Which Plaintiff in Error Intends to Rely and of the Parts of the Record Which Plaintiff in Error Thinks Necessary for the Consideration of Said Errors. Filed Dec. 9, 1922. F. D. Monckton, Clerk.

[Endorsed]: Printed Transcript of Record. Filed January 3, 1923. F. D. Monckton, Clerk.

No. 3950

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Tuesday, the twentieth day of February, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge; The Honorable FRANK H. RUDKIN, Circuit Judge.

No. 3950.

JAMES COX DAVIS, etc.,
Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix, etc.,
Defendant in Error.

Order of Submission.

ORDERED above-entitled cause argued by Mr. Edwin C. Matthias, counsel for the plaintiff in error, and by Mr. William Martin, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of April, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; The Honorable FRANK H. RUDKIN, Circuit Judge.

No. 3950.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error.

Order Directing Filing of Opinion and Filing and Recording of Judgment.

By direction of the Honorable William B. Gilbert, William W. Morrow, and Frank H. Rudkin, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in the above-entitled cause be forthwith filed by the Clerk and that a judgment be filed and recorded in the minutes of this court, in accordance with said opinion.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3950.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Before GILBERT, MORROW and RUDKIN, Circuit Judges.

A judgment was recovered in the Court below for damages for the death of the plaintiff's decedent, who was killed in a collision between the automobile in which he was riding and a railroad train of the Great Northern Railway Company. The negligence charged in the complaint is in substance that the train was run at an excessive speed through the town of Monitor and across its public highway where many pedestrians, automobiles, and conveyances were crossing almost constantly, that the defendants failed to give signal by bell or whistle before crossing said highway, that they permitted a large number of freight-cars to remain standing on the industry track in the town of Monitor, leaving scarcely sufficient width of high-

way for an automobile to pass and obstructing the view of approaching trains, that they permitted the highway where it crossed the right of way and tracks, to get out of repair and neglected to plank the roadway between said tracks and rails, that it permitted empty box-cars to stand and remain upon its side-tracks at Monitor, leaving only sufficient space for passing machines, that it maintained warehouses along the tracks so placed as to obstruct the view of its tracks, that the crossing was dangerous and the defendants had been frequently notified of its dangerous character, but had failed to employ a watchman or install gates or gongs or other devices for the safety of the driving public, and that the defendants neglected to take any steps to check its said train after the decedent was seen in the act of crossing the tracks.

GILBERT, Circuit Judge, after stating the case:

Error is assigned to the denial of the defendant's motion for an instructed verdict in its favor for the plaintiff's failure to prove her allegations of negligence. There was evidence that the decedent, together with his son, sixteen years of age, and another man were riding in a Chevrolet roadster through the town of Monitor. All three knew how to drive automobiles. The decedent was familiar with the road as it passed through Monitor. Not long before the date of the accident, he had written to the railroad company pointing out the dangers of the crossing and requesting that steps be taken to make it more safe. He himself had been a railroad man for some sixteen years. His son was a

competent and experienced driver. There were three railway tracks at the crossing. On the day of the accident, box-cars were spotted on the industry track on either side of the crossing. From the industry track to the passing track was 22.9 feet and between the passing track and the main track the distance was 10.32. There was evidence that on the day of the accident, the decedent while at his home heard train No. 1 pass Monitor going West. He took it to be train 26 going East, for train No. 1 was more than two hours late, and was passing at the time when 26 should have been going by. There was evidence that at the time of the collision, the train was running at a speed of from 60 to 65 miles an hour. It struck the rear end of the automobile when it was nearly across the track and practically cut off the rear end of the machine. The bodies of the occupants were thrown through the air a distance of 120 feet. There was evidence that the train had failed to give the half-mile station whistle or the customary two long and two short whistles for the crossing at the quarter-mile post, or to ring the bell as it approached the highway. The engineer testified however, that he gave a whistle a mile before reaching Monitor and, just before the engine struck the automobile, he gave four whistles, two long and two short, that he did not give a danger whistle because he did not think it was necessary, that he thought the automobile was going to stop, and that for the same reason he failed to put on the air brakes. He testified also that he thought the automobile would get across and for that rea-

son he did not put the air on, and he said that if the automobile had kept on going at the same speed, it would have gotten across before it was struck. In view of all evidence, it is very clear that the trial court would not have been justified in taking the case from the jury. Indeed as we read the testimony, we find it difficult to see how the jury could have failed to find that there was negligence on the part of the defendants and that such negligence was the proximate cause of the accident.

The question of the contributory negligence of the decedent and his son was submitted to the jury under proper instructions. This Court has held that the negligence of the driver of an automobile will not as a matter of law be imputed to a passenger or guest who is riding in the machine, although the latter must exercise due and reasonable care for his own protection and safety. Hines vs. Johnson, 264 Fed. 465. The occupants of the machine in this case were perhaps misled by hearing the whistle of train No. 1 going west two hours late, and running on the time of No. 26 going east, and by their failure to hear any signal of the approaching train. It may have been that their vision was obstructed by the standing empty box-cars and the freight-cars some of which were being unloaded on trucks. There was the further fact that the sound of the rapids of the river near by was sufficient at times to drown all sound of approaching trains. Under the circumstances, the question of contributory negligence was peculiarly one for the jury.

There was evidence tending to show that the decedent was the owner of the automobile. There was evidence on the other hand that his son was the owner. The Court instructed the jury that the owner of an automobile who rides in it while it is driven by another is answerable for the latter's negligence and that if the decedent was the owner and the driver was found to be negligent and that such negligence was in any degree a contributing cause of the collision, the plaintiff was not entitled to recover. The plaintiff in error contends that it was entitled to an instruction that the decedent was in law the owner of the automobile. This contention is based upon a statute of the State of Washington, which provides as follows: "Upon the sale of any motor vehicle, the delivery thereof shall not be deemed to have been made until the vendor shall have removed his number plates therefrom and the vendee shall have procured a license therefor and placed the new number plates thereon." The proof was that the automobile had been purchased by the decedent and a vehicle license had been issued in his name and that it so stood of record at the time of the accident, but there was testimony that he had given the car to his son. In Peters vs. Casualty Co. of America, 101 Wash. 208, the Court in construing the statute held that in a case of an action for personal injuries suffered through the negligence of the driver of an automobile, it would be conclusively presumed that "so far as the rights of the public are concerned" the person to whom the vehicle license

has been issued was the owner of the car if he permitted his license number to remain on the car after he had executed a contract purporting to convey the title to another. In the case at bar we are not convinced that it was error to refuse the requested instruction. The State statute so cited is in the nature of a police regulation for the protection of the general public, to enable one who is injured by the negligent driving of an automobile to localize responsibility and to identify the answerable person therefor by a public record showing the licensee of the vehicle. The case at bar is not within the evil intended to be remedied by the statute. The plaintiff in error had no occasion to know who was the licensed owner of the automobile in question and it could make no difference to it whether the car belonged to the decedent or to his son or to some other person.

We find no error. The judgment is affirmed.

[Endorsed]: Opinion. Filed April 16, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3950.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the

plaintiff in error for her costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered April 16, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourteenth day of May, in the year of our Lord one thousand nine hundred and twenty-three. Present: the Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable FRANK H. RUDKIN, Circuit Judge.

No. 3950.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Honorable William B. Gilbert, William W. Morrow, and Frank H. Rudkin, Circuit Judges, before whom the case was heard, it is ORDERED that the petition filed April 28, 1923, on behalf of the plaintiff in error for a rehearing of the above-entitled case be, and hereby is denied.

In the Supreme Court of the United States.
October Term 1922–23.

JAMES COX DAVIS, as the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of WILSON M. SLOCOMB, Deceased,

Defendant in Error.

Petition for Writ of Error.

To the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, and to the Justices of the said Honorable Court:

The petition of James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, plaintiff in error above named, respectfully shows:

This action was originally brought by Defendant in Error in the Superior Court of the State of Washington for King County against the Great Northern Railway Company, a corporation, and James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, to re-

cover the sum of Seventy-five Thousand Dollars ($75,000.00) (Rec. 2). It was removed by plaintiff in error and the said Railway Company to the United States District Court for the Western District of Washington (Rec. 16). Defendant in error being a citizen and resident of the State of Washington, plaintiff in error being a citizen and resident of the State of Illinois, and the Great Northern Railway Company being a citizen and resident of the State of Minnesota, and the action being brought under the Acts of Congress governing the Federal control of railroads, and under the terms of the Transportation Act of 1920, it was properly removable, on the ground of diversity of citizenship, which is one of the grounds set forth in the petition for removal filed by the plaintiff in error and by the said defendant, Great Northern Railway Company.

The jurisdiction of the District Court was also invoked in plaintiff in error's petition for removal and in the petition for removal filed by the said Railway Company, on the ground the action arose under the laws of the United States. The action is prosecuted against the plaintiff in error under the Acts of Congress governing the Federal control of railroads, to wit, the Act of Congress approved August 29, 1916, entitled "An Act making Appropriations for the Support of the Army for the Fiscal Year ending June 30, 1917, and for other purposes," the Proclamation of the President, dated December 26, 1917, taking over all the railroads and placing the same under Federal control, pursuant to said

Act of August 29, 1916, the Act of Congress approved March 21, 1918, entitled "An Act to provide for the operation of Transportation Systems while under Federal control, for just compensation to their owners, and for other purposes," and the Proclamation of the President, appointing the plaintiff in error, James Cox Davis as the agent of the United States under and in pursuance of Section 206 of the Transportation Act of 1920.

Not only was the jurisdiction of the District Court invoked on the last-named ground, because of which writ of error lies to this Court under the authority of Southern Pacific Co. vs. Stewart, 245 U. S. 562, 62 L. Ed. 472, but the construction of the said laws of the United States was directly involved.

At the time the case was removed to the District Court the Great Northern Railway Company was a party defendant. While the action could be prosecuted against petitioner only in pursuance of the Acts of Congress governing the Federal control of railroads, the railroad corporation was not a proper party defendant. The Federal question thus presented was substantial and fundamental, and essential to the disposition which was made of the cause, and therefore the case was removable on the ground the action arose under the laws of the United States as well as on the ground of diversity of citizenship. Being removable on both grounds, writ of error lies to this Court. Weiland vs. Pioneer Irrigation Co., 17 U. S. Sup. Ct. Adv. Op. 639 (July 15, 1922); N. P. Ry. vs. Soderberg

188 U. S. 526, 529, 47 L. Ed. 575, 581. After the case was removed to the District Court, the demurrer of the railroad corporation to the complaint was sustained (Rec. 30–32). Thereafter the action proceeded to trial, and judgment was rendered against plaintiff in error. The laws of the United States under which the complaint alleges, and the petition for removal recites, the action is brought, as said by this Court in Butte & Superior Copper Co. vs. Clark-Montana Realty Co., 249 U. S. 12, 22, 63 L. Ed. 447, 456, are the foundation of the right of the defendant in error to recover from the plaintiff in error, and to that extent the construction of those acts, even after the demurrer of the corporate defendant to the complaint had been sustained, was directly involved.

This action was brought by the defendant in error for the benefit of herself, as widow of Wilson M. Slocomb, to recover for her husband's death, which occurred at a highway crossing in the village of Monitor in the State of Washington on November 27th, 1919, in a collision between an automobile, in which he was riding, and a train operated by plaintiff in error. The trial resulted in a verdict in favor of the defendant in error.

The action is prosecuted by the defendant in error under Chapter 123 of the Session Laws of the State of Washington for the year 1917, the material part of which is as follows:

> "When the death of a person is caused by the wrongful act, neglect or fault of another, his personal representative may maintain an

action for damages against the person causing the death and although death shall have been caused under such circumstances as amount in law to a felony.

"Every such action shall be brought for the benefit of the wife, husband, child or children of the person whose death shall have been so caused."

Motions to take the case from the jury at the close of defendant in error's case (Rec. 117), for a directed verdict at the close of all the evidence (Rec. 220), and for a new trial (Rec. 42), were all denied, and judgment entered in favor of the defendant in error on the verdict (Rec. 63). The case was taken to the United States Circuit Court of Appeals for the Ninth Circuit by writ of Error (Rec. 289). The cause having been argued and submitted on briefs, judgment was entered by the Circuit Court of Appeals, affirming the lower Court on the 16th day of April, 1923 (Rec. 317). Within the time provided by law, a petition for rehearing was filed, and on the 14th day of May, 1923 denied (Rec. 318). In affirming the judgment of the trial court, the Circuit Court of Appeals of the Ninth Circuit has refused to follow the interpretation placed upon statutes of the State of Washington by the highest court of that state. Being in some doubt as to whether writ of error or writ of certiorari will lie to this Court, petitioner is applying, by separate applications, for a writ of error and a writ of certiorari. A certified copy of the entire record in said case in the Circuit Court

of Appeals and the District Court, marked Exhibit "A," is hereby furnished, attached to and made a part of this petition.

At the time he was killed, deceased, together with his sixteen year old son, Cecil, and his ranch manager, was riding in a one-seated Chevrolet Roadster. The son was driving. All three occcupants of the automobile were almost instantly killed (Rec. 117). At the trial, the defendant in error, the only surviving heir, testified that Mr. Slocomb purchased the automobile in August (the accident happening the following November), and gave it to the son Cecil. She also testified that Cecil had no money of his own, except that which his parents gave to him every Monday morning when he went to school, and that the boy did not pay his father for the car (Rec. 86–88). The expense of maintenance and operation was paid by his parents. Furthermore, the undisputed testimony was that Mr. Slocomb's license plate for the year 1919 issued by the State of Washington, was on the automobile at the time of the accident, and that this license was issued to Mr. Slocomb on his application of August 21, 1919, and that no license was ever issued to the son (Rec. 166, 148, 149, Defendant's Exhibit "R"). Defendant in error reported the automobile to the Probate Court as the property of her husband's estate (Rec. 88, Defendant's Exhibits "A," "B" and "C").

At the time of the accident the following statutes with reference to motor vehicle licenses were in force in the State of Washington:

"Application for a motor vehicle license shall be made in triplicate to the county auditor of the county in which the applicant resides on blanks to be furnished by the secretary of state.

"Such application shall be made by the owner of the vehicle, or his duly authorized agent, over the signature of such owner or agent, and he shall certify that the statements therein are true to the best of his knowledge. Such signatures shall be attested, without charge, by the county auditor, or by one of his deputies, or it may be attested by a notary public or other officer authorized to administer oaths.

"The application must show:

"(1) The name of the owner, with the business or residence address thereof, or both, if there be such, etc." (Chapter 142, Laws of Washington, 1915, page 388, section 5) (not amended in 1917.)

"No license shall be transferred from one person to another person," etc. (Chapter 155, Laws of Washington, 1917, p. 630, Sec. 5.)

The original statute with reference to removal of license plates upon the sale of an automobile was Section 13, found at page 391 of the Washington 1915 Session Laws, reading as follows:

"Upon the sale of any motor vehicle the delivery thereof shall not be deemed to have been made until the vendor shall have removed his number plates therefrom, and the vendee shall have secured a license therefor and placed the new number plates thereon."

The statute was amended in 1917, so as to remove all possible doubt of the duty imposed upon automobile owners to remove their number plates upon a change of ownership. The underscored language which follows is that which was added by the 1917 amendment:

> "Upon the sale of any motor vehicle the vendor shall remove his number plates therefrom, and delivery shall not be deemed to have been made until the vendor has removed his number plates." (Laws 1917, Chap. 155, Sec. 9, p. 633.)

The Act of 1917 was in effect at the time of the Slocomb accident.

In the case of Peters vs. Casualty Company of America, 101 Wash. 208, 172 Pac. 220, the 1915 Act was construed by the highest appellate court of the State of Washington to mean in an action for personal injuries arising out of an automobile accident, that one who leaves his license plate on an automobile, after making manual delivery, in pursuance of a sale, is conclusively presumed to remain the owner, and that it will be conclusively presumed as against him that whoever was in fact driving the automobile with his license plate upon it, was doing so as his agent. It was held that under such circumstances a person leaving his license plate on the automobile cannot avoid liability attaching to him as owner of the car by introducing evidence that he had sold it and made delivery prior to the accident. In view of the fact that the language of the 1917 amendment is more direct and mandatory than that of the original 1915 Act, the decision of the Supreme

Court of Washington, interpreting the 1915 Act, must be controlling upon the Federal courts. Counsel for petitioner called especial attention to the Peters case and to the statutes of Washington, in connection with the instructions which he requested the trial court to give to the jury (Rec. 221).

At the time of the Slocomb accident the motor vehicle law of Washington also provided:

> "Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages by reason of injury to person or property resulting from the negligent use of the public highways by the driver or operator of any motor vehicle or its owner or his employee, or agent, and the owner of such vehicle shall be equally liable for the negligent operation thereof, when at the time of such injury the vehicle was operated by the agent of such owner, or by any person employed by him for the purpose of operating such vehicle."

(Laws of Washington 1915, Chap. 142, Sec. 33, p. 396, not amended in 1917.)

In Moore vs. Roddie, 103 Wash. 386, 388, 174 Pac. 648 and Samuels vs. Hiawatha Holstein Dairy Co., 115 Wash. 343–350, 197 Pac. 24, this last statute was construed by the highest court of the State of Washington, that court making this reference to it in the Samuels case:

> "It is a positive statutory rule in this state that the owner of such vehicle shall be liable for the negligent operation thereof, when at the

time of such injury the vehicle was operated by the agent of such owner, or by any person employed by him for the purpose of operating such vehicle."

The only possible distinction between the Peters case and the case now at bar is that the question here involved is the liability of the licensed owner for the contributory negligence of the driver, whereas in the Peters case it was as to his liability for the driver's original negligence. It is not only logically impossible to separate the two, holding the licensed owner liable for the original negligence, but not for the contributory negligence, of the driver, but such a holding is also in direct conflict with the decisions of the Supreme Court of Washington interpreting Washington statutes.

Petitioner contended in the lower courts and contends here, that under these Washington statutes, as interpreted by the Supreme Court of Washington, Mr. Slocomb's license plate having been on the automobile at the time of the accident, he was in law, so far as the rights of the public, including petitioner, were concerned, the owner of the automobile, and therefore the negligence of his agent, his minor son Cecil, was imputable to him. It is our contention that Cecil was guilty of contributory negligence as a matter of law, and therefore a verdict should have been directed for petitioner, or in any event, petitioner was entitled to an instruction, to the effect that Mr. Slocomb was the owner of the automobile and answerable for his son's negligence, if the jury found the son to have been negligent.

The Trial Court not only refused to direct a verdict, but refused to rule, as a matter of law, that so far as the rights of the public and this petitioner were concerned, Mr. Slocomb was the owner of the automobile, and submitted this issue to the jury. In allowing the jury to pass on the question, the Court permitted it to find that the son was the owner of the automobile, in spite of the fact that a positive statute of the State of Washington declared that Mr. Slocomb was the owner, and it permitted the jury to return a verdict against the petitioner, even though it found the collision to have been the result of the combined negligence of the petitioner and defendant in error's son and agent.

Under Chapter 123 Laws of Washington, 1917 (heretofore quoted herein), and decisions of the Supreme Court of Washington, interpreting that statute, defendant in error, as administratrix, cannot recover if Mr. Slocomb could not recover for his injuries were he alive. Ostheller vs. S. & I. E. Railroad Co., 107 Wash. 678, 182 Pac. 630, Heath vs. Wylie, 109 Wash. 86, 186 Pac. 313. When the Ostheller accident occurred Section 183, Remington & Bellinger's Code of Washington was in effect, but at the time of the Heath accident that statute had been repealed, and Chapter 123 Laws of Washington 1917 was in effect. The Washington Court reached the same conclusion in both cases, giving the same interpretation to both statutes. It follows that the contributory negligence of the son, if found either as a matter of fact or as a matter of law, must bar defendant in error's right of recovery,

just as it would bar Mr. Slocomb's right of recovery for his injuries were he alive.

Washington is a community property state, the statutes in regard thereto being as follows:

"Separate Property of Husband.—Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property, without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried." (Sec. 5915, Rem. & Bal. Code of Washington).

"Separate Property of Wife.—The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise, by will, such property, to the same extent and in the same manner that her husband can, property belonging to him." (Sec. 5916 Rem. & Bal. Code of Washington).

"Community Property Defined.—Husband's Control of Personalty.—Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community

property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof." (Sec. 5917, Rem. & Bal. Code of Washington.)

Under decisions of the Supreme Court of Washington interpreting the community property statutes, this automobile was the property of the community, composed of Mr. and Mrs. Slocomb. Also damages recovered for death suffered, as well as for injuries received, by a member of the community are community property. Also recovery cannot be had for the death of a member of the community, if the negligence of an agent of the community while driving the automobile, was a contributing cause of the accident. Ostheller vs. S. & I. E. Railroad, *ubi supra;* Heath vs. Wylie, *ubi supra,* Burch vs. Abercrombie, 74 Wash. 46, 133 Pac. 1202; Stewart vs. Bank of Endicott, 82 Wash. 106, 143 Pac. 458; Marston vs. Rue, 92 Wash. 29, 159 Pac. 111; Patterson vs. Bowes, 78 Wash. 476, 139 Pac. 225.

This is an action for the death of a member of the community, composed of Mr. and Mrs. Slocomb, occurring while their automobile was being driven by the minor son Cecil, as agent of the community. The Supreme Court of Washington has held that under these statutes the community is liable for the contributory negligence of its agent while driving the automobile, and that there can be no recovery for the death of a member of the com-

munity, if the agent of the community while driving the community automobile was guilty of contributory negligence. When the legislature of the State of Washington passed the act under discussion in the Peters case, *ubi supra,* it must have intended that the licensed owner should be subject to such liabilities as the law imposes. It not only said nothing about any limitation of liability, but inserted in the statute a provision: "The owner of such vehicle shall be equally liable for the negligent operation thereof, when at the time of such injury the vehicle was operated by the agent of such owner." It was not open to the Circuit Court of Appeals, in view of the decisions of the Supreme Court of Washington interpreting these statutes, to say that the escape of responsible persons in transactions of this character (where a claim is made of transfer of ownership of the automobile, although the original license was still upon the car at the time of the accident) from liability for the contributory negligence of the driver, was not one of the evils intended to be remedied by the statute. The Washington Court having held that the escape of such persons from liability for the original negligence of the driver is one of the evils remedied by that statute, its interpretation necessarily includes within the scope of the statute liability of the licensed owner for the contributory negligence of the driver. The Washington Court having also held under the community property statutes of the State of Washington, that an owner of an automobile is liable for the contributory negligence of the driver

in those instances where he is liable for the original negligence, the Circuit Court of Appeals should have held that there could be no recovery for deceased's death, if the son Cecil was guilty of contributory negligence.

Not only did the Circuit Court of Appeals refuse to so hold, but it has approved instructions given by the District Court, by which the jury was permitted to find that Mr Slocomb did not own the automobile, but that it was owned by the son (in face of the Washington statute heretofore quoted and the decision interpreting it), that the son was in no way responsible to his father, and that the accident was the result of the combined negligence of the petitioner and of defendant in error's son. Thus, the instructions permitted the jury to find that defendant in error could recover of the petitioner for injuries received as the result of the combined negligence of petitioner and defendant in error's agent, in direct conflict with statutes of the State of Washington and decisions of the highest appellate court in that state interpreting those statutes. The amount involved herein and the matter in controversy exceed the sum of One Thousand Dollars ($1,000) besides costs, and this is not a case in which the jurisdiction of the Circuit Court of Appeals is made final.

All of the above facts appear in the record in said action and in the opinion and final judgment of said Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the Trial Court, whereby manifest error has happened, to the dam-

age of this petitioner, plaintiff in error above named.

WHEREFORE, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Circuit Court of Appeals for the Ninth Circuit, and to the Judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and that the errors complained of by your petitioner may be examined and corrected and the said judgment reversed, and that judgment may be entered in this action, directing the dismissal of the same, or in the alternative, ordering a new trial.

And your petitioner will ever pray.

JAMES COX DAVIS,
As the Agent Designated by the President of the United States Under and in Pursuance of the Transportation Act of 1920, Petitioner.

By F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,
Solicitors.

Writ of error disallowed this 23 day of June, 1923, on the ground that the judgment of the Circuit Court of Appeals is final, but this disallowance is without prejudice to the further presentation of this petition to myself for any other justice or judge having authority to allow the writ.

EDWARD T. SANFORD,
Associate Justice of Supreme Court of United States.

United States of America,
State of Minnesota,
County of Ramsey,—ss.

F. G. Dorety being first duly sworn, on oath deposes and says that he is one of the solicitors for James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, petitioner; that he has read the foregoing petition for writ of error, knows the contents thereof, and believes the same to be true.

F. G. DORETY.

Subscribed and sworn to before me this 11th day of June, 1923.

EARLE W. McELROY,
Notary Public in and for Ramsey County, State of Minnesota, residing at St. Paul.

My Commission expires Feb. 23, 1925.

The foregoing petition for writ of error being again presented to me, with supporting briefs, upon further consideration thereof, the writ of error is allowed, as prayed, this July 30th, 1923.

EDWARD T. SANFORD,
Assoc. Justice Supreme Ct. of U. S.

[Endorsed]: No. 3950. United States Circuit Court of Appeals for the Ninth Circuit. In the Supreme Court of the United States. October Term 1922–23. James Cox Davis, as the Agent designated by the President of the United States Under and in Pursuance of the Transportation Act

of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, deceased, Defendant in Error. Petition for Writ of Error. Filed Aug. 8, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the Supreme Court of the United States
October Term, 1922–23.

JAMES COX DAVIS, as the Agent designated by the President of the United States, under and in Pursuance of the Transportation Act of 1920.

Plaintiff in Error.

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb Deceased.

Defendant in Error.

Assignment of Errors and Prayer for Reversal.

Comes now the plaintiff in error, James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, and submits and files herewith, at the time of presenting his petition for a writ of error herein, the following assignment of errors upon which he will rely upon his prosecution of his writ of error in the above-entitled cause in the Supreme Court of the United States for relief from the judgment rendered herein, and further submits that in the record, proceedings, decision and final judgment of the Cir-

cuit Court of Appeals of the Ninth Circuit, and of the District Court of the Western District of Washington, in the above-entitled cause, there is manifest error in this, to wit:

I.

The Circuit Court of Appeals erred in affirming the judgment of the District Court of the Western District of Washington in said action.

II.

The Circuit Court of Appeals erred, as did also the said District Court in holding and deciding that the defendant in error herein is entitled to any judgment against the above-named plaintiff in error upon the record in the above-entitled action, and in failing to hold that a verdict should be directed for plaintiff in error.

III.

The Circuit Court of Appeals erred in refusing to hold that the District Court should have granted plaintiff in error's motion for a nonsuit at the close of defendant in error's case.

IV.

The Circuit Court of Appeals erred in refusing to hold that the District Court should have granted plaintiff in error's challenge to the sufficiency of the evidence, and plaintiff in error's motion for judgment and for a directed verdict in his favor, at the close of all the evidence in the case.

V.

The Circuit Court of Appeals erred in sustaining the following instruction given to the jury by the said District Court:

"If the deceased, Wilson M. Slocomb, was guilty of no contributory negligence and he had no control over the driver of the car, and the driver of the car was in no way responsible to him, and the car did not belong to the deceased, and the collision was the result of concurring negligence of both the railway company in the operation of its train, as complained of in the complaint, and the driver of the automobile, over whom the deceased had no control, and in a car in which he had no interest and exercised no control, the plaintiff would be entitled to recover." (Record 237.)

VI.

The Circuit Court of Appeals erred in sustaining the following instruction given to the jury by the said District Court:

"You are further instructed that the duty owed by deceased as a passenger in the automobile is in addition to that owed by him as owner of the car. Well, I would hardly say in addition. That assumes he was the owner of the car, and that is one of the facts for you to try." (Record 249.)

VII.

The Circuit Court of Appeals erred in sustaining the following instruction given to the jury by the said District Court:

"Even though you should find from the evidence that the speed of the train was excessive, or that the engineer failed to give a warning of its approach, if such were the fact, it did not

relieve the deceased, or the driver of the automobile, if a person other than the deceased, from the necessity of taking ordinary precautions for his own safety; that is, provided the driver was a person for whose action the deceased was responsible." (Record 249.)

VIII.

The Circuit Court of Appeals erred in failing to hold that the District Court erred in refusing to instruct the jury as requested by plaintiff in error, as follows:

"The jury is instructed to return a verdict for the defendant." (Record 198.)

IX.

The Circuit Court of Appeals erred in failing to hold that the District Court erred in refusing to instruct the jury as requested by plaintiff in error, as follows:

"You are instructed that the deceased, Wilson M. Slocomb, was the owner of the automobile, and that it is wholly immaterial, so far as this case is concerned, by whom the automobile was driven at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should consider the deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving." (Record 208.)

X.

The Circuit Court of Appeals erred in failing to hold that the District Court erred in refusing to in-

struct the jury as requested by plaintiff in error, as follows:

"You are instructed that it is conclusively presumed that the deceased, Wilson M. Slocomb, was the owner of the automobile. You need not concern yourselves with the question as to who was driving the automobile at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should consider deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving. The deceased was an occupant of the automobile, and whether it was driven by him or by some other person, he is answerable for the negligence of the driver.

"If you find in this case that the driver of the automobile, no matter by whom it was driven, was negligent, and that his negligence contributed in any degree as a proximate cause to the collision, then I charge you that plaintiff is not entitled to recover, and your verdict should be for the defendant." (Record 208.)

XI.

The Circuit Court of Appeals erred in failing to hold that the District Court erred in refusing to instruct the jury as requested by plaintiff in error, as follows:

"You are instructed that an automobile is personal property, and that the law presumes that personal property in the possession of a mature man is his own, and the burden of prov-

ing that this automobile was the property of the son, Cecil Slocomb, is on the plaintiff.

"In this connection you are instructed that the laws of the State of Washington provide that an application for a motor vehicle license must show the name of the owner of the automobile, with the business or residence address thereof, or both, if there be such, and that such application shall be made to the county auditor by the owner of the vehicle, or his duly authorized agent, over the signature of such owner or agent, and that he shall certify on oath that statements therein are true to the best of his knowledge. The law also provides that no license shall be transferred from one person to another person, and if there is a transfer of the title to an automobile, before the new owner is entitled to operate it he must take out a new license.

"The law further provides that upon the sale or transfer of title of any motor vehicle, the seller or person who is conveying his interest therein, must remove his number plates therefrom, and delivery of the automobile or a change of ownership will not be deemed to have been made until the seller or party conveying his interest, has removed the number plates.

"In determining the ownership of this automobile, you may consider any application that was made for a license, also any and all other facts and circumstances which tend to prove the ownership thereof. You should also consider

whether deceased removed his number plates before he gave the automobile to his son, Cecil, if you believe that he did give it to Cecil, and if you find that he did not remove his number plates then I instruct you that it will be conclusively presumed that the deceased was the owner of the automobile at the time of the accident, and you must disregard the evidence of the alleged ownership by Cecil." (Record 209.)

XII.

The Circuit Court of Appeals erred in failing to hold that the District Court erred in refusing to instruct the jury as requested by plaintiff in error, as follows:

"If you believe from the evidence that the son Cecil was driving the car, and that he was guilty of negligence which contributed in any degree as a proximate cause of the collision, or that the deceased, Wilson M. Slocomb, was guilty of negligence, either as driver of the car or as a passenger, while his son Cecil or Glen Long was driving the car, which in any degree contributed as a proximate cause to the collision, then I charge you the plaintiff cannot recover, and your verdict should be for the defendant." (Record 211.)

XIII.

The Circuit Court of Appeals erred in failing to hold that the District Court erred in refusing to instruct the jury as requested by plaintiff in error, as follows.

"You are instructed if, after passing the box

cars standing on the industry track, the approaching train was in full view of the occupants of the automobile, if they looked in that direction, and if you further find at that time the automobile was traveling at a rate of speed which would have enabled the driver of the automobile to stop or turn aside, and avoid a collision with the train, if he had looked in the direction of the train and seen it approaching, then in that event the driver of the automobile was guilty of negligence, and deceased, Wilson M. Slocomb, as owner of the automobile, was responsible for the said negligence of the driver, and, if you so find, your verdict should be for the defendant." (Record 217.)

XIV.

The Circuit Court of Appeals erred in failing and refusing to order a new trial in said action, and in failing and refusing to follow the laws and statutes of the State of Washington, and the interpretation placed thereon by the highest appellate court of the State of Washington.

WHEREFORE, Plaintiff in error prays that the judgment of the Circuit Court of Appeals for the Ninth Circuit, and of the District Court of the United States for the Western District of Washington, be reversed, and that such directions be given that full force and efficacy may inure to plaintiff in error by reason of his defense to said cause.

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATHIAS,
Solicitors for Plaintiff in Error.

[Endorsed]. No. 3950. United States Circuit Court of Appeals for the Ninth Circuit. In the Supreme Court of the United States. James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, deceased, Defendant in Error. Assignment of Errors and Prayer for Reversal. Filed Aug. 8, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the Supreme Court of the United States

October Term 1922 23.

JAMES COX DAVIS, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error.

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, deceased,

Defendant in Error.

Order Allowing Writ of Error.

The above-entitled matter coming on to be further heard upon the petition of James Cox Davis, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, plaintiff in error therein, for a writ of error from the Supreme Court of the United States to the Circuit Court of Appeals of the Ninth Circuit,

the undersigned having examined the said petition, the assignment of errors filed in support thereof, and a certified copy of the record in the Circuit Court of Appeals, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter;

IT IS ORDERED, that a writ of error be and the same is hereby allowed to the Circuit Court of Appeals of the Ninth Circuit from the Supreme Court of the United States.

This appeal being prosecuted by the United States or by the direction of a department of the United States government.

IT IS FURTHER ORDERED that no appeal or supersedeas bond be required.

Done and dated in Linville in the State of North Carolina, this 30th day of July, 1923.

EDWARD T. SANFORD,
Justice of the Supreme Court of the United States.

[Endorsed]: No. 3950. United States Circuit Court of Appeals for the Ninth Circuit. In the Supreme Court of the United States. James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, deceased, Defendant in Error. Order allowing Writ of Error. Filed Aug. 8, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3950.

JAMES COX DAVIS, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error.

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error.

Motion for Order Directing Original Exhibits to be Forwarded to the Supreme Court of the United States.

Comes now the plaintiff in error above named and moves the court for an order directing the Clerk of the above-named Court to forward to the Clerk of the Supreme Court of the United States at his office in the City of Washington, District of Columbia, all of the original exhibits heretofore introduced in evidence at the trial of this cause and heretofore forwarded to this Court, to wit: Plaintiff's Exhibits 1 to 20, inclusive, and Defendant's Exhibits "A" to "R," inclusive, and for an order directing that said exhibits need not be printed.

This motion is based upon the affidavit of E. C. Matthias attached hereto and hereby made a part hereof.

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Plaintiff in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES COX DAVIS, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error.

Affidavit of E. C. Matthias.

State of Washington,
County of King,—ss.

E. C. Matthias, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in error herein, and makes this affidavit for and on his behalf; that a writ of error has been allowed in this cause from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit, and that in order for the Supreme Court of the United States to properly consider the said cause on appeal and

to have all the evidence in said cause before it, it is necessary that the original exhibits introduced in the trial of said cause, to wit: Plaintiff's Exhibits 1 to 20, inclusive, and Defendant's Exhibits "A" to "R," inclusive, be forwarded to the Clerk of the Supreme Court of the United States. Affiant further says that the authenticity of said original exhibits is in no way involved, and that the printing of said exhibits is therefore unnecessary.

[Seal] E. C. MATTHIAS.

Subscribed and sworn to before me this 6th day of August, 1923.

THOMAS BALMER,

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed.] In the United States Circuit Court of Appeals for the Ninth Circuit. James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, Deceased, Defendant in Error. Motion for Order Directing Original Exhibits to be Forwarded to the Supreme Court of the United States and Affidavit of E. C. Matthias. Filed Aug. 9, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3950.

JAMES COX DAVIS, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error.

Order for the Forwarding of the Original Exhibits to the Supreme Court of the United States.

THIS MATTER coming on for hearing before the Court on the motion of the plaintiff in error for an order directing the Clerk of this Court to forward to the Clerk of the Supreme Court of the United States all the exhibits introduced in evidence at the trial of this cause, and the Court being fully advised in the premises, and the Court having heretofore received from the District Court of the Western District of Washington, Northern Division, Plaintiff's Exhibits, marked 1 to 20, inclusive, and Defendant's Exhibits, marked "A" to "R," inclusive;

IT IS HEREBY ORDERED that the Clerk be, and he is hereby directed to forward to the Clerk of the United States Supreme Court for the inspec-

tion of that Court on appeal of this case all of the original exhibits introduced at the trial of this cause and forwarded to this Court in connection with the appeal of said cause, which includes plaintiff's exhibits 1 to 20, inclusive, and defendant's Exhibits "A" to "R," inclusive, and IT IS FURTHER ORDERED that said exhibits need not be printed.

Done this 11th day of August, 1923.

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, Administratrix of the Estate of Wilson M. Slocomb, Deceased, Defendant in Error. Order for the forwarding of the original exhibits to the Supreme Court of the United States. Filed Aug. 13, 1923. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3950.

JAMES COX DAVIS, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error.

Praecipe Indicating Portions of the Record to be Incorporated into the Transcript of Record on the Writ of Error, as Provided by Rule 8 of the United States Supreme Court.

To the Clerk of the above-entitled Court, GREETING:

Please prepare a transcript of the record in the above-entitled cause to be filed in the office of the Clerk of the Supreme Court of the United States in the City of Washington, District of Columbia, on or before the 28th day of September, 1923, pursuant to the writ of error heretofore issued in said cause, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. Complaint appearing at page 1 of transcript of record, together with all endorsements thereon.

2. Summons with affidavit of service, appearing

at page 12 of transcript of record, together with all endorsements thereon.

3. Appearance of attorneys for plaintiff, appearing at page 14 of transcript of record, together with all endorsements thereon.

4. Petition for removal, appearing at page 16 of transcript of record, together with all endorsements thereon.

5. Appearance of attorneys for defendant, appearing at page 22 of transcript of record, together with all endorsements thereon.

6. Notice of presentation of petition for removal and acceptance of service thereof, appearing at page 23 of transcript of record, together with all endorsements thereon.

7. Bond for removal, appearing at page 24 of transcript of record, together with all endorsements thereon.

8. Order removing cause to the United States District Court, appearing at page 27 of transcript of record, together with all endorsements thereon.

9. Demurrer of Great Northern Railway Company, together with acceptance of service, appearing at page 30 of transcript of record, and all endorsements thereon.

10. Order sustaining demurrer of Great Northern Railway Company, appearing at page 32 of transcript of record, together with all endorsements thereon.

11. Answer of James Cox Davis, together with acceptance of service, appearing at page 33 of

transcript of record, together with all endorsements thereon.

12. Reply, and acceptance of service thereof, appearing at page 38 of transcript of record, together with all endorsements thereon.

13. Order permitting complaint to be amended by interlineation, appearing at page 40 of transcript of record, together with all endorsements thereon.

14. Verdict, appearing at page 42 of transcript of record, together with all endorsements thereon.

15. Petition for new trial, and acceptance of service, appearing at page 42 of transcript of record, and all endorsements thereon.

16. Order denying petition for new trial, together with acceptance of service, appearing at page 61 of transcript of record, and all endorsements thereon.

17. Judgment, together with acceptance of service, appearing at page 63 of transcript of record, and all endorsements thereon.

18. Motion for extension of time to file bill of exceptions, together with acceptance of service, appearing at page 65 of transcript of record, together with all endorsements thereon.

19. Order granting extension of time to file bill of exceptions, appearing at page 67 of transcript of record, together with all endorsements thereon.

20. Bill of exceptions, appearing at pages 68 to 263 of transcript of record, together with and including defendant's motion for nonsuit, defendant's motion to withdraw the last clear chance rule from the jury, defendant's motion for a directed verdict

at the close of all the testimony, instructions of the Court to the jury, defendant's requested instructions, and defendant's exceptions to the Court's instructions to the jury and to the Court's refusal to give defendant's requested instructions, as embraced in said bill of exceptions as it appears in said transcript of record, together with all endorsements on said bill of exceptions, and also including Plaintiff's Exhibits 1 to 20, inclusive, and Defendant's Exhibits "A" to "R," inclusive.

21. Order settling bill of exceptions and certificate of the Court to the bill of exceptions, appearing at page 264 of the transcript of record, together with all endorsements thereon.

22. Motion for original exhibits to be sent to the Circuit Court of Appeals, appearing at page 267 of the transcript of record, together with all endorsements thereon.

23. Order for original exhibits to be sent to the Circuit Court of Appeals, appearing on page 280 of the transcript of record, together with all endorsements thereon.

24. Petition for writ of error to the District Court of the United States for the Western District of Washington, Northern Division, appearing at page 268 of the transcript of record, together with all endorsements thereon.

25. Assignment of errors and prayer for reversal, appearing at page 269 of the transcript of record, together with all endorsements thereon.

26. Order allowing writ of error, appearing at

page 282 of transcript of record, together with all endorsements thereon.

27. Bond on writ of error, appearing at page 278 of the transcript of record, together with all endorsements thereon.

28. Praecipe for transcript of record in the Circuit Court of Appeals, appearing at page 283 of the transcript of record, together with all endorsements thereon.

29. Certificate of the Clerk of the District Court of the United States for the Western District of Washington to the certified record on appeal to the Circuit Court of Appeals, appearing at page 287 of the transcript of record, together with all endorsements thereon.

30. Writ of error to the United States District Court for the Western District of Washington, Northern Division, appearing at page 289 of the transcript of record, together with all endorsements thereon.

31. Citation and acknowledgment of service, appearing at page 291 of the transcript of record, together with all endorsements thereon.

32. Statement of errors on which plaintiff in error relied and of the parts of the record which plaintiff in error deemed necessary for the consideration of said errors in the Ninth Circuit Court of Appeals, as appears at pages 294 to 305, inclusive, of the transcript of record, together with all endorsements thereon.

33. The entire record in said cause and proceedings in the Ninth Circuit Court of Appeals, in-

cluding (a) order of submission; (b) order directing filing of opinion and filing and recording of judgment; (c) opinion of the Ninth Circuit Court of Appeals; (d) judgment of the Ninth Circuit Court of Appeals; (e) order denying petition for rehearing.

34. Assignment of errors and prayer for reversal of the judgment of the Ninth Circuit Court of Appeals by the Supreme Court of the United States, together with all endorsements thereon.

35. Petition for writ of error to the Ninth Circuit Court of Appeals, together with all endorsements thereon.

36. Order allowing writ of error to the Ninth Circuit Court of Appeals, together with all endorsements thereon.

37. Original writ of error to the Ninth Circuit Court of Appeals, together with all endorsements thereon.

38. Original citation with acknowledgment of service, together with all endorsements thereon.

39. Motion for order forwarding original exhibits to the Supreme Court of the United States, and affidavit in support thereof, together with all endorsements thereon.

40. Order directing said exhibits to be forwarded to the Supreme Court of the United States, together with all endorsements thereon.

41. This praecipe, together with all endorsements thereon.

Said transcript of record to be prepared as required by law and the rules of this Court and of

the supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States in the City of Washington, District of Columbia, on or before the 28th day of September, 1923.

Dated at Seattle, Washington, this 7th day of August, 1923.

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS.
Attorneys for plaintiff in Error.

Service of the foregoing praecipe indicating portions of the record to be incorporated into the transcript of record on the writ of error, as provided by Rule 8 of the United States Supreme Court, is admitted by receipt of a copy thereof this 7th day of August, 1923.

WM. MARTIN,
_____,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit, James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, Deceased, Defendant in Error. Praecipe indicating portions of the record to be incorporated into the transcript of record on the writ of error, as provided by Rule 8 of the United States Supreme Court. Filed Aug. 9, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3950.

JAMES COX DAVIS, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Return to Writ of Error from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and sixty-one (361) pages, numbered from and including 1 to and including 361 to be a full, true and correct copy of the record, and of the assignment of errors, and of all proceedings had in the above-entitled case, made by and pursuant to the praecipe filed by counsel for the plaintiff in error on the 9th day of August, 1923, under Rule 8 of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office,

and that the same, together with the accompanying original exhibits, marked as follows:

Plaintiff's Exhibits: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20; and

Defendant's Exhibits: A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q and R,

constitute the transcript of record and return to the writ of error from the Supreme Court of the United States in the above-entitled cause as made up and certified pursuant to said praecipe.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22d day of August, A. D. 1923.

[Seal]

F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

In the Supreme Court of the United States.
October Term 1922–23.

JAMES COX DAVIS, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals for the Ninth Circuit before you, or some of you, between Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, deceased, plaintiff, and James Cox Davis, as the agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, defendant, a manifest error hath happened, to the great damage of the said defendant, James Cox Davis, as the agent designated by the President of the United States

under and in pursuance of the Transportation Act of 1920, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within sixty days from the date hereof in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, the first day of August in the year of our Lord, one thousand nine hundred and twenty-three.

[Seal] WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

Allowed by Edward T. Sanford, Associate Justice of the Supreme Court of the United States, July 30th, 1923.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a

certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, California, this 18th day of August, A. D. 1923.

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT,

[Seal] By F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 3950. United States Circuit Court of Appeals for the Ninth Circuit. In the Supreme Court of the United States. James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, deceased, Defendant in error. Writ of Error. Filed Aug. 8, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the Supreme Court of the United States.
October Term 1922–23.

JAMES COX DAVIS, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error,

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error.

Citation.

The United States of America,—ss.

To Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, deceased, GREETING:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America at the City of Washington, District of Columbia, within sixty days from the date hereof, pursuant to writ of error filed in the Clerk's office of the Supreme Court of the United States, wherein James Cox Davis, as the agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected,

and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward T. Sanford, Justice of the Supreme Court of the United States of America this 30th day of July, 1923.

EDWARD T. SANFORD,
Associate Justice of the Supreme Court of the United States.

Service of the within citation by receipt of a copy thereof admitted this 6th day of August, 1923.

WM. MARTIN,
H. A. M.,
Solicitors for Defendant in Error.

[Endorsed]: No. 3950. United States Circuit Court of Appeals for the Ninth Circuit. In the Supreme Court of the United States. James Cox Davis, as the Agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, Plaintiff in Error, vs. Marion C. Slocomb, as Administratrix of the Estate of Wilson M. Slocomb, deceased, Defendant in Error. Citation. Filed Aug. 8, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

Endorsed on cover: File No. 29,840. U. S. Circuit Court Appeals, 9th Circuit. Term No. 530. James Cox Davis, as the agent of the President, &c., plaintiff in error, vs. Marion C. Slocomb, as administratrix of the estate of Wilson M. Slocomb, deceased. Filed September 4th, 1923. File No. 29,840.

In the Supreme Court of the United States

OCTOBER TERM 1922-23

No. 379

JAMES COX DAVIS, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error

Notice of Motion to Dismiss Writ of Error

To the above named Plaintiff in Error and to Messrs. F. G. Dorety, Thomas Balmer and Edwin C. Matthias, his attorneys:

You, and each of you, will please take notice that on Monday, the first day of October, 1923, on the opening of the Supreme Court of the United States at twelve o'clock noon, or as soon thereafter as the matter can be heard, the undersigned will move the

Supreme Court of the United States at the court room thereof in the City of Washington, District of Columbia, for an order granting defendant in error's motion to dismiss the writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and will submit with said motion the said defendant in error's brief in support of such motion, together with this notice and your admission of service, copies of which motion and brief are herewith served upon you at Seattle, Washington, this 31st day of August, 1923.

ARTHUR E. GRIFFIN,
WM. MARTIN,
Attorneys for Defendant in Error.

In the Supreme Court of the United States

OCTOBER TERM 1922-23

No. 379

JAMES COX DAVIS, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error

Motion to Dismiss Writ of Error

Comes now the defendant in error, Marion C. Slocomb, as administratrix of the estate of Wilson M. Slocomb, deceased, and in response to the citation issued in the above entitled action and court by the Honorable Edward T. Sanford, one of the justices of said court, on the 30th day of July, 1923, and moves that the writ of error in the above entitled action be dismissed upon the following grounds:

First, for the reason that this court is without jurisdiction.

Second, for the reason that said writ is without merit, and was taken for delay only.

Third, for the reason that said writ was not brought within ninety days from the date of the entry of the final decree in the above entitled action, in the United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR E. GRIFFIN,
WM. MARTIN,
Attorneys for Defendant in Error.

STATEMENT

This action was commenced by the defendant in error in the Superior Court of the State of Washington for King County, as plaintiff, against the Great Northern Railway Company, a corporation, (organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business in said State of Minnesota, and a citizen, resident and inhabitant of the said State of Minnesota) and the owner of the line of railroad on which the plaintiff's decedent, Wilson M. Slocomb, was killed on the 27th day of November, 1919, while the same was being operated by Walker D. Hines, Director General of Railroads, under the Transportation Act approved March 21, 1918, and James Cox Davis, his successor, as the agent designated by the President of the United States under and in pursuance of the Transportation Act of February 28, 1920, as defendants.

A petition for the removal of the action was filed by both defendants in said Superior Court and an order entered thereon transferring the case to the United States District Court for trial, upon the grounds as alleged in the petition, that the Great

Northern Railway Company was a citizen, resident and inhabitant of the State of Minnesota and not of the State of Washington; and that the defendant, James Cox Davis, as the agent designated by the President of the United States, under and in pursuance of the Transportation Act of 1920, was at all times mentioned in the complaint a citizen, resident of the State of Washington; and that this action, but for the Federal control of the line of railroad, owned by the Great Northern Railway Company, would have been transferable to the said United States District Court upon the petition of said Great Northern Railway Company.

The case was tried in the United States District Court for the Western District of Washington, Northern Division, resulting in a judgment dismissing the action as to the defendant, the Great Northern Railway Company and awarding judgment against the defendant, James Cox Davis, as Agent, for $13,750.00 and costs. A writ of error was taken from this judgment by the plaintiff in error James Cox Davis, as Agent, to the United States Circuit Court of Appeals for the Ninth Circuit and by that court affirmed. The case is in this court upon a writ of error and a petition for a writ of *certiorari*.

ARGUMENT

I

This case was transferred from the Superior Court of the State of Washington to the United States District Court upon the grounds of diversity of citizenship. It is too well settled for argument that where the jurisdiction of the District Court is dependent upon the diversity of citizenship of the parties to the action that a writ of error will not lie from the decision of the United States Circuit Court of Appeals to this court. Sec. 128 of Judicial Code, Act of March 3, 1891, Chap. 517; Sec. 6, 26 Stat. at Large 829 and Sec. 3 of the Act of September 6, 1916 (39 Stat. at L. 726, 727, Chap. 448, Comp. Stat., 1120a, Fed. Stat. Anno. Supp. 1918, p. 420).

When this cause of action arose on November 27, 1919 the railroad company was under the operation of the Transportation Act, approved March 21, 1918. U. S. Comp. St. 1918, U. S. Comp St. Ann. Supp. 1919, Section 3115-3/4a—3115-3/4p. This act did not create or confer this cause of action nor did it arise under or by virtue of the statute. The State of Washington prior thereto had adopted,

in effect the "Lord Campbell's Act." The statute reads, "When the death of a person is caused by the wrongful act, neglect, or fault of another, his personal representative may maintain an action for damages against the person causing the death and although death shall have been caused, under such circumstances, as amount in law, to a felony." Section 183 of Volume 1 of Remington's Comp. Stats. of Washington, 1922.

The defendant in error's cause of action did not arise out of the federal statute which moreover denies the right of removal of actions against railroad companies, or rather the Director General, except in cases where the railroad company had the right to remove prior to the passage of the statute.

Section 10 of the Transportation Act of March 21, 1918, contains the following:

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law."

The word "carriers," as used in this section, while under government control for the purposes of all actions for liabilities arising during government control, has reference to the Director General and his successor, James Cox Davis, as construed by

this court in the case of *Missouri Pacific R. Company v. Ault*, (256 U. S. 554, 65 Law Ed. 1087). This section also provides:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any such action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted."

Referring to this section this court speaking, through Mr. Justice Brandeis, says:

"The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of Federal operation. . . . Operation was to be continued as theretofore, with the old personnel, subject to change by executive order. The courts were to go

on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception, the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control."

The provision of this section "nor shall any carrier be entitled to have transferred to a Federal court any action heretofore or hereinafter instituted by or against it, which action was not so transferable prior to Federal control of such carrier" seems to be conclusive that neither the Director General of Railroads nor his successor, James Cox Davis, could have removed this case from the State Court to the United States District Court except for the fact that the Great Northern Railway Company would have had the right to remove the case on the grounds of diversity of citizenship of the parties, had the railway company been operating the road instead of the Director General at the time of the accident, and the provision that "in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government" precludes the plaintiff in error from bringing this case into this court on a writ of error from the United States

Circuit Court of Appeals for the Ninth Circuit, when the Great Northern Railway Company could not have done so. It must be admitted that the Great Northern Railway Company could not have removed this case from the State Court to the Federal Court except on grounds of the diversity of citizenship of the parties, and likewise could not bring this case into this court upon a writ of error. The plaintiff in error under Section 10 of the Statute referred to, would have no greater legal right to do so than the Great Northern Railway Company had, and it was clearly prohibited from doing so by Section 128 of the Judicial Code, Act of March 3, 1891, Chap. 517, Sec. 6, 26 Stat. at Large and by Section 3 of the Act of September 6, 1916 (39 Stat. at L. 726, 727 Chap. 448, Comp. Stat. 1120a, Fed. Stat. Anno. Supp. 1918, p. 420). Referring to this section District Judge Westenhaver, in the case of *Smith v. Babcock & Wilcox Company* (260 Fed. 681) says:

"This section further provides that no defense shall be made in any actions at law or in equity to enforce any liability on the ground that the carrier is an instrumentality or agency of the federal government, and that no such carrier shall be entitled to transfer any action brought by or against it to any federal court. Obviously this means that right

to sue in or remove to the federal court is not restricted or enlarged in consequence of federal control. Construing these provisions together with the entire act, it seems obvious that Congress intended to interfere as little as could be avoided with the situation existing at the time the railroads were taken over, and that the rights and remedies of all persons should be preserved and might be enforced with a minimum of interference with pre-existing rights and remedies. Assuming the existence of a liability it seems evident that it was intended parties should have the right to assert the same in any court, and in the same manner as it might previously have been asserted. This intent extends, not merely to the jurisdiction of the court. . . . The fact that the liability arising during federal control is not a liability of the owners of the railway lines, but of the United States, requires for convenience that the party to be sued should be its Director-General; but at the same time it seems manifest that no change in the manner or method of asserting that liability was intended or has been made. Properly construed, section 10 means that any court which would have had jurisdiction of plaintiff's action against the Babcock & Wilcox Company and the Akron & Barberton Belt Railroad Company prior to federal control will have jurisdiction under federal control, and that no court which would not have had jurisdiction over plaintiff's cause of action, except for federal control, does not have it in consequence of federal control. To hold otherwise would be manifestly inconsistent with the general tenor and effect of the act itself."

We submit that this construction of this statute is correct and that the jurisdiction in the District Court in this case was dependent entirely on the admitted fact of the diversity of citizenship of the parties to this action and that this court is without jurisdiction. This court in the case of *James C. Davis, as Agent, etc., Plaintiff in Error, v. W. M. Scroggins, In Error* to the United States Circuit Court of Appeals for the Fifth Circuit, in its opinion (284 Fed. Rep. at 760, decided by this court June 4, 1923, of the October Term Volume 67 Law Ed. Advanced Sheet No. 17 at Page 783); James C. Davis, as Agent, Plaintiff in error, v. Charles Hareford, (Writ denied April 23, 1923, 67 Law Ed. Phamplet No. 16 Page 594) dismissed these cases, and many others could be cited, for want of jurisdiction under the statutes referred to.

It may be contended, however, by the petitioner that as it alleged in its petition for removal of this case from the State Court to the Federal Court "that said cause is a suit of a civil nature at law; that the matter in controversy in said action exceeds, exclusive of interest and costs, the sum or value of three thousand dollars ($3,000); that said suit arises under the constitution and laws of the United States, to wit; the Act of Congress approved

August 29, 1916, entitled "An Act Making Appropriations for the Support of the Army for the Fiscal Year Ending June 20, 1917, and for other purposes," the Proclamation of the President, dated December 26, 1917, taking over all railroads and placing the same under Federal Control, pursuant to said Act of June 20, 1917, the act of Congress (14) approved March 21, 1918, "An Act to provide for the operation of transportation systems while under Federal Control, for the just compensation to their owners, and for other purposes," and the Proclamation of the President, heretofore made, appointing the defendant, James Cox Davis, "as the Agent of the United States under and pursuance of the Transportation Act of 1920" that the petitioner would be entitled to a removal of this case from the State Court to the Federal Court on the grounds that this suit arises under the constitution and laws of the United States. Section 10 of the "Transportation Act" answers this contention when it says: "And in any action which has heretofore been so transferred because of such federal control *or any act of Congress* or official order or proclamation relating thereto, shall upon motion of either party be retransferred to the court in which it was originally instituted" (Italics ours). However this suit

did not arise under the constitution or laws of the United States. It arose by reason of Section 183, Volume 1 of Remington's Compiled Statutes of Washington 1922 which gives a right of action where the death of a person is caused by the wrongful act, neglect or fault of another to the personal representative of such decedent. Without this statute the defendant in error in this case would not have any cause of action whatever, against any one. The mere fact of the passage of the Government Control and Transportation Acts by Congress and the Proclamations of the President, taking over and operating the railroads, had nothing whatever to do with, nor in any respect create or give rise to defendant in error's cause of action, which was created, conferred and given to the defendant in error solely and exclusively by the act of the legislature of the State of Washington. Clearly, the fact that the plaintiff in error is the agent of the Government does not enlarge his rights to have this case reviewed by a writ of error, in any respect greater than the Great Northern Railway Company would have had, if it were to have asked to have the case reviewed by writ of error. The writ should be dismissed for want of jurisdiction.

II

The writ should also be dismissed for want of merit and was taken for delay only. As stated in the brief of the defendant in error in opposition to the issuance of a writ of certiorari, practically the only questions involved in this case are questions of fact. There were no errors prejudicial to Plaintiff in error committed by the trial court in its instructions to the jury. The slightest examination of the instructions given by the trial court will convince this court that the instructions were much more favorable to the plaintiff in error than the plaintiff in error, under the evidence, was entitled to have had given to the jury. If there were any errors committed by the trial court in its instructions to the jury they were against the defendant in error and not the plaintiff in error. Besides the plaintiff in error did not preserve sufficient exceptions to the instructions given by the trial court, upon which it would be entitled to have them reviewed either by the Circuit Court of Appeals or this court by writ of error. At the time at which the trial court concluded giving its instructions to the jury certain objections and exceptions were attempted to be made and to be taken by the plaintiff

in error. They did not point out to the trial court wherein any of the instructions given were erroneous so that the trial court could correct the same. At the time at which the plaintiff in error attempted to take these exceptions the trial court called the attorney's attention to this fact in the following language:

"THE COURT: The defendant is allowed exceptions to any refusal to give requested instructions made by the defendant, and the plaintiff is allowed exceptions to any refusal to instruct as requested by plaintiff, and other exceptions are denied and disallowed because it is not pointed out wherein they are not correctly stated." (Page 222 of Bill of Exceptions; Transcript of Record, page 260 on application for writ of certiorari).

This court will also observe that most all of the instructions given to which the plaintiff in error now objects and assigns error upon, were really given at the request of the plaintiff in error. Some without modification and others with but a slight modification, and the failure of the court to again repeat some of the instructions requested by the plaintiff in error was due, principally, to the fact that the court considered that it had already given the instructions, substantially, as requested.

Take for instance the instruction on which the petitioner bases his application for a writ of cer-

tiorari in this case. The petitioner claims that the trial court should have instructed the jury, under the Motor Vehicle Staute of the State of Washington, referred to, that the decedent, Wilson M. Slocomb, was the owner of the automobile in which he was killed, for the reason that the license number plates which were upon the automobile at the time had been issued to the decedent, Wilson M. Slocomb, and makes his ninth assignment in his petition (Page 19) as follows:

"9th. The Circuit Court of Appeals erred in failing to hold that the District Court erred in refusing to instruct the jury as requested by petitioner, as follows: 'You are instructed that the deceased, Wilson M. Slocomb, was the owner of the automobile, and that it is wholly immaterial, so far as this case is concerned, by whom the automobile was driven at the time of the accident, except, if you believe it was driven by the son, Cecil, then you are instructed that you should consider the deceased's duty under the circumstances, not only as owner, but as father of the boy who was doing the driving.' "

The petitioner also requested the trial court to give the following instruction:

"If you believe that the son, Cecil, was driving the car, then in deciding the question of whether deceased, Wilson M. Slocomb, was negligent, you should consider not only the fact that the deceased

was the owner of the car, but also the relation of father and son, and the *tender* age of Cecil, and determine under those circumstances whether the deceased was negligent in any degree contributing as a proximate cause to the accident." Page 211 of Record (Italics ours).

The trial court gave this instruction to the jury in the exact language requested by the petitioner except for the omission of the word "tender," and as follows:

"If you believe that the son, Cecil, was driving the car, then in deciding the question of whether deceased, Wilson M. Slocomb, was negligent, you should consider not only the fact *that the deceased was the owner of the car*, but also the relation of father and son, and the age of Cecil, and determine under these circumstances whether the deceased was negligent in any degree contributing to the proximate cause of the accident." Record 247. (Italics ours).

The court will find from the examination of the instructions requested by the petitioner and those given by the court that the petitioner requested the same instructions two and three times disguised slightly in different language so that the trial court in giving its instructions to the jury in this case, in the hurry of the moment and in the confusion of the long and numerous instructions requested, prac-

tically gave the same instruction twice on different phases of the case a number of times.

The court further instructed the jury: "The law further provides that upon the sale or transfer of title upon any motor vehicle the seller or person who is conveying his interest therein must remove his number plates therefrom." (Record of instructions as given, Page 246). (Record of instructions as requested by petitioner, Page 210).

The court will observe that the positive instruction given at the request of the petitioner that the decedent, Wilson M. Slocomb, *was not only the owner of the car in which he was killed*, but that the jury must also consider in addition to that fact the relationship of the father and son and the age of the son in determining whether or not the deceased was negligent in any degree contributing to the proximate cause of the accident, in case the jury found that the son Cecil, was driving the car at the time of the accident. This instruction was more emphatic and favorable to the petitioner than the instruction which the court did not give and on which the petitioner bases his allegation for a writ of certiorari claiming that the Circuit Court of Appeals in not repeating the same instruction in slightly different language failed to place the same

interpretation upon the Motor Vehicle Statute of Washington that the Supreme Court of the State of Washington placed upon it or rather would have placed upon it had the case been tried in the State Court and for that reason claims to be entitled to a retrial of the same issues in this court which were tried and determined in the Circuit Court of Appeals.

The respondent does not consider it necessary to more than call the court's attention to the facts in this record by the foregoing statement in order to have the petition for a writ of error applied for, denied. The respondent does, however, request this court to take some action to put an end to such frivolous applications for writs of error and the vexatious delays caused thereby, by the imposition of terms in this case, even though the petitioner is the agent of the Government. It would put an end to the expenditure of large sums by the government in the useless printing of records and in the payment of large attorneys' fees for the prosecution of frivolous cases to this court instead of applying the money to the payment of its just obligations. Defendant in error asks that terms be imposed by directing that 10% of the amount of the judgment be added to the judgment.

III

Neither the assignments of error, the petition for writ of error, order allowing writ of error nor the original writ of error to the United States Circuit Court of Appeals for the Ninth Circuit were applied for or filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit or with the Clerk of this Court within the ninety days required by Section 6 of the Act of Congress passed September 6, 1916, Comp. Stats. Section 1228a 39 Stat. at L. 727, Chap. 448, Fed. Stat. Anno. Supp. 1918, p. 422; *Glasgow Nav. Co. v. Munson S. S. Line*, 246 U. S. 647, 62 L. Ed. 919, 38 Sup. Ct. Rep. 315; *Collard v. Pittsburg, C. C. & St. L. R. Co.*, 246 U. S. 653, 62 L. Ed. 922, 38 Sup. Ct. Rep. 336.

The final judgment in this case was filed and entered in the Circuit Court of Appeals on the 16th day of April, 1923 (Record 317) and the writ of error taken herein was filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit the 8th day of August, 1923. It is true the amendment of September 6, 1916, reads: "All writs of error, appeals or certiorari to the Supreme Court of the United States from any court shall not be allowed unless applied for within three

months from the entry of the judgment or decree." Heretofore, however, in determining the time within which the writ of error may be brought it is not considered brought until it is filed with the court which rendered the judgment. *Old Nick Williams Co. v. United States*, 83 C. C. A. 73, 152 Fed. 926, affirmed in 215 U. S. 543, 54 L. Ed. 320, 30 Sup. Ct. Rep. 221; *United States v. Baxter*, 2 C. C. A. 410, 10 U. S. App. 241, 51 Fed. 624; *Threadgill v. Platt*, 71 Fed. 3; *Mutual L. Ins. Co. v. Phinney*, 22 C. C. A. 425, 48 U. S. App. 78, 76 Fed. 617. Filing of writ below is essential to be operative. *Waxahachie v. Coler*, 34 C. C. A. 349, 92 Fed. 285.

It is respectfully submitted that the writ of error should be dismissed.

ARTHUR E. GRIFFIN,
WM. MARTIN,
Attorneys for Defendant in Error.

Copy of denfendant's notice of motion to dismiss writ of error, motion to dismiss writ of error and brief thereon received this 31st day of August, 1923.

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,
Attorneys for Plaintiff in Error.

FILED
SEP 24 192

In the

Supreme Court of the United States

OCTOBER TERM 1923

No. 530

JAMES COX DAVIS, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error

Brief of Plaintiff in Error in Resistance to Motion to Dismiss Writ of Error

F. G. DORETY
ST. PAUL, MINNESOTA

THOMAS BALMER EDWIN C. MATTHIAS
302 KING STREET STATION, SEATTLE, WASHINGTON

SOLICITORS FOR PLAINTIFF IN ERROR

In the

Supreme Court of the United States

OCTOBER TERM 1923

No. 530

JAMES COX DAVIS, as the Agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920,

Plaintiff in Error

vs.

MARION C. SLOCOMB, as Administratrix of the Estate of Wilson M. Slocomb, Deceased,

Defendant in Error

Brief of Plaintiff in Error in Resistance to Motion to Dismiss Writ of Error

STATEMENT OF THE CASE

The statement made by the defendant in error being inaccurate in certain respects, a brief restatement will be made. This action was originally brought by defendant in error in the superior court of the State of Washington for King County against the Great Northern Railway Company, a corpora-

tion, and James Cox Davis, as the agent designated by the President of the United States under and in pursuance of the Transportation Act of 1920, to recover the sum of seventy-five thousand dollars ($75,000.00), for the death of her husband, in a collision at a highway crossing in the State of Washington. (Rec. 2.) It was removed by plaintiff in error and the said railway company to the United States District Court for the Western District of Washington. (Rec. 16.) Defendant in error being a citizen and resident of the State of Washington, plaintiff in error being a citizen and resident of the State of Illinois, and the Great Northern Railway Company being a citizen and resident of the State of Minnesota, and the action being brought under the terms of the Transportation Act of 1920, it was properly removable, on the ground of diversity of citizenship, which is one of the grounds set forth in the petition for removal filed by the plaintiff in error and by the said defendant, Great Northern Railway Company. (Rec. 18.)

The jurisdiction of the District Court was also invoked in plaintiff in error's petition for removal and in the petition for removal filed by the said railway company, on the ground the action arose

under the laws of the United States. (Rec. 16.) The action is prosecuted against the plaintiff in error under the act of Congress known as the Transportation Act of February 28, 1920, and the proclamation of the President, appointing the plaintiff in error, James Cox Davis, as the agent of the United States under and in pursuance of section 206 of that act. (Rec. 2.)

At the time the case was removed to the District Court the Great Northern Railway Company was a party defendant. After removal of the case, the demurrer of the railroad corporation to the complaint was sustained. (Rec. 30-32.) Thereafter the action proceeded to trial, and judgment was rendered against plaintiff in error. (Rec. 63.) The case was then taken to the Circuit Court of Appeals for the Ninth Circuit on writ of error, and, having been affirmed in that court, it is in this court upon a writ of error granted by Associate Justice Sanford, after careful consideration of a written brief by plaintiff in error in support of its application for the writ (Rec. 335, 336), and upon petition for a writ of certiorari.

The argument which follows is to the effect that writ of error lies because the case was properly removable, on the ground it arose under the con-

stitution and laws of the United States, and therefore the judgment of the Circuit Court of Appeals of the Ninth Circuit is not final. So far as we can find, the point raised has not been argued in this court. We believe it has sufficient merit to warrant the court's serious consideration. We pray the motion to dismiss may be denied, or that writ of error be allowed to stand for the present, writ of certiorari granted and that all questions be argued at the time the case is heard on its merits.

ARGUMENT

The argument of defendant in error will be answered in the order it is made in her brief, using the same subdivisions.

I

This cause of action arose during Federal control, but suit was not brought until after the railroads had been returned to their owners. Therefore it was brought against the agent designated by the President under the Transportation Act of 1920, and that act (and not the Federal Control Act) is controlling. Defendant in error's argument in support of her motion to dismiss the writ of error is

based entirely on section 10 of the Federal Control Act. That act is erroneously referred to by her counsel as "The Transportation Act of March 21, 1918." While the subject matter of the act of 1918 is transportation, it is commonly known as the Federal Control Act, and must not be confused with the Transportation Act of 1920. If the defendant in error had a cause of action against the agent of the President, her authority to bring such suit must be found in the Transportation Act of 1920.

If the Transportation Act of 1920, or some similar legislation had not been passed by Congress, there could be no recovery in this case for a tort committed during Government control, because section 10 of the Federal Control Act (sec. 3115 3/4 J, U. S. Compiled Statutes 1918) is expressly limited to actions brought against carriers while under Federal control.

But for the provision of section 206A and B of the Transportation Act, upon the return of the properties to their owners, the railroads would have ceased to be agents of the government. *Granquist v. Duluth, M. & N. Ry.*, 193 N. W. 126. Likewise the position of director general became vacant upon return to their owners of the properties he was

directing. Had an act not been passed such as the Transportation Act of 1920 and an agent appointed in pursuance thereof, there would have been no means of bringing suit on causes of action accruing during federal control, after the termination of that control, unless it would have been held that such suits could be instituted directly against the government of the United States.

Without such legislation as the Transportation Act of 1920, the right to initiate such suits on causes of action arising during federal control, would have existed, if at all, to the same extent and subject to the same restrictions that the right existed to sue the government on other causes of action. The right to bring such suits would not have existed at all because an action for injuries received during federal control of railroads is an action against the government of the United States.

Dahn v. Davis, 258 U. S. 421, 66 L. Ed. 696.

Missouri Pacific v. Ault, 256 U. S. 553, 65 L. Ed. 1087.

Nash v. Southern Pacific, 260 Fed. 280.

An action can not be maintained against the United States, except by its consent. Jurisdiction can not be exercised by any court against the United States, unless the plaintiff can bring his case within

some act of Congress. This is the law even though the lack of such a statute causes a citizen to be without redress for a tort committed by a government agent.

Schillinger v. United States, 155 U. S. 163, 39 L. Ed. 108.

Gibbons v. United States, 8 Wall 269-276; 19 L. Ed. 453.

United States v. Eckford, 6 Wall 488; 18 L. Ed. 920.

Westbrook v. Director General, 263 Fed. 211.

Haubert v. B. & O. Ry., 259 Fed. 361.

This being the situation at the end of federal control, the Transportation Act was passed. Section 206A of that act provides:

"Actions at law * * * based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916), of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this act. Such actions, suits or proceedings may * * * be brought in any court, which but for federal control would have had jurisdiction of the cause of action had it arisen against such carrier."

This statute is permissive. It relates to original jurisdiction. It does not purport to restrict removal or the right of appeal. In legal contemplation the United States is the real defendant. The liability is imposed upon it, and it will pay any judgment against the defendant. Since jurisdiction can not be exercised by any court against the United States, unless the plaintiff can bring his case within some act of Congress, this legislation was necessary in order for any court to obtain original jurisdiction. The right of removal and appeal remained the same after the passage of the act. *Stark v. Payne*, 271 Fed. 477.

At the time the Transportation Act of 1920 became effective the right of removal from state to Federal court and of appeal to this court existed as to all causes of action arising under the laws of the United States, causes of action against the government granted by the Federal Control Act having ceased to exist after the termination of Federal control. If such causes of action had not ceased to exist there would have been no necessity for section 206 of the Transportation Act. That act can not be construed as repealing the right of removal and appeal in all cases arising thereunder as one of the laws of the United States, because in order to

effect a repeal by implication there must be irreconcilable inconsistency and repugnancy. If any part of the earlier act (Sec. 1010, 1120 and 1218 Judicial Code, 1918 Compiled Statutes, granting right of removal and appeal in all cases arising under the laws of the United States) can stand as not superseded or affected by the later act, it is not repealed. 25 R. C. L. 916; *Wood v. United States*, 16 Peters, 342; 10 L. Ed. 987; *Baltimore etc. Railroad v. Bates*, 119 U. S. 464, 30 L. Ed. 436.

One statute will not be held to repeal another by implication, unless it appears from the terms and provisions of the later act that it was the intention of the legislature to enact a new law in place of the old. The intent to repeal must very clearly appear, and the courts will not hold to a repeal if they can find reasonable ground to hold the contrary. 25 R. C. L. 917.

Repeals by implication are not favored and will not be indulged if there is any other reasonable construction. The presumption is always against the intention to repeal where express terms are not used. 25 R. C. L. 918. The principle that the law does not favor repeals by implication is of especial application in the case of an important public statute of long standing, which should be

shown to be repealed, either expressly or by a strong and necessary implication. 25 R. C. L. 920.

An action brought against the agent of the President under the Transportation Act of 1920 arises under the laws of the United States. As said by this court in the *Ault* and *Dahn* cases, *ubi supra*, the United States government is the party defendant in such a case. The consent that it is necessary for the United States to give, in order to enable the defendant in error to wage this suit, is found in Section 206A and B of the Transportation Act. An action prosecuted against the agent of the President under this act is just as much an action that arises under the laws of the United States as an action brought against a corporation, incorporated under the laws of the United States, or an action brought against a receiver appointed by a United States court. It is well settled that an action by or against a corporation, created by an act of Congress, is one arising under a law of the United States.

N. P. Ry. v. Amato, 144 U. S. 465; 36 L. Ed. 506.

Union Pac. v. Harris, 158 U. S. 326; 39 L. Ed. 1003.

Pac. R. R. Removal Cases, 115 U. S. 1, 11; 29 L. Ed. 319.

Bankers Trust Co. v. T. & P. Ry., 241 U. S. 295; 60 L. Ed. 1010.

T. & P. R. R. v. Marcus, 237 U. S. 214; 59 L. Ed. 924.

Sup. Lodge Knights of Pythias v. Smyth, 245 U. S. 593, 597; 62 L. Ed. 492, 497.

Osborn v. U. S. Bank, 9 Wheat. 738, 822; 6 L. Ed. 204.

T. & P. Ry. v. Hill, 237 U. S. 208; 59 L. Ed. 918.

In re Mary Dunn, 212 U. S. 374, 383; 53 L. Ed. 558, 562.

In *Union Pac. v. Harris, supra*, Chief Justice Fuller, speaking for the court, says:

"It is not for us to inquire why writs of error to Circuit Courts of Appeal in actions for damages for negligence of railroad corporations should be allowed, simply because the corporations are chartered under the laws of the United States, in a statute whose object was to relieve an overburdened court, since such is the effect of the statute according to its plain language."

In *Tex. & Pac. Ry. v. Hill, ubi supra*, a personal injury case, commenced in the state court of Texas, removed to the Federal court and appealed to the Supreme Court, passing on a motion to dismiss the writ of error, Chief Justice White, speaking for the court says:

"As a corporation created by an act of Congress, the plaintiff in error is inherently entitled to invoke our jurisdiction. Hence the motion to dismiss is without merit."

In the case of *In re Mary Dunn*, 212 U. S. 374, 383; 53 L. Ed. 558, 562, it is said:

"As a corporation derives all its rights from the laws of Congress, a suit brought against it on account of its action, arises under the constitution or laws of the United States."

It is likewise well settled that an action by or against a receiver appointed by a United States court, is one arising under a law of the United States. This has been held in personal injury actions against federal receivers.

Auten v. U. S. National Bank, 174 U. S. 125, 141; 43 L. Ed. 920.

White v. Ewing, 159 U. S. 36-39; 40 L. Ed. 67.

McNulta v. Lochridge, 141 U. S. 327, 332; 35 L. Ed. 796.

Betts v. Bisher, 213 Fed. 581.

Cobb v. Sertic, 218 Fed. 320.

St. Bernard v. Shane, 220 Fed. 852.

Keihl v. City of South Bend, 76 Fed. 921.

It has also been held that a suit against the Emergency Fleet Corporation, based on a contract

made by it for the construction of vessels, is one arising under the laws of the United States, since the Emergency Fleet Corporation owes its creation and power to make a contract to a law of Congress. *Atlantic Corporation v. U. S. Shipping Board*, 286 Fed. 222. Likewise, the agent of the United States under the Transportation Act of 1920, is made liable for torts committed during federal control of railroads by a law of Congress.

The position of the agent designated by the President under the Transportation Act of 1920 is very similar to that of a receiver appointed by a United States court. As said by Justice Brandeis in *Missouri Pacific Ry. v. Ault, ubi supra*:

"The situation was analagous to that which would exist if there were a general receivership of each transportation system."

The operating revenues of the railroads during Federal control were the property of the United States, and the expenses of the transportation system, including the payment of judgments, were met by funds appropriated by Congress. No liability during this period attached to the railroad corporations.

N. P. Railway v. N. Dak., 250 U. S. 134-136; 63 L. Ed. 897, 902.

Federal Control Act, 49 Stat. at L. 451, Sec. 1-6.

Transportation Act of 1920, 41 Stat. at L. 456, secs. 202, 206, 210.

The analogy between a federal corporation and the agent designated by the President under the Transportation Act of 1920, and as between the latter and the Emergency Fleet Corporation, is almost perfect. While a Federal corporation is directly created by an act of Congress, the agent of the President was created by the President under the authority of an act of Congress. The agent is just as much the creature of an act of Congress. The right of plaintiff to make him defend and hold responsible for a tort committed during government control has its origin solely in the act which authorizes the President to appoint such officer. The artificial being, known as the agent, designated by the President, like a federal corporation, was created by federal law and derives his every power, authority and liability from federal law. In those cases in which it is held that a suit against a corporation incorporated under the laws of the United States is a suit arising under the laws of the United States, and therefore removable and appealable to this court, it is said that the char-

ter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue and be sued, is given and measured by the charter, and that such charter is a law of the United States. All the faculties and capacities possessed by federal corporations are derived from their acts of incorporation, and all their doings arise out of those laws, and therefore suits by and against them are suits arising under the laws of the United States. Likewise, every power the agent under the Transportation Act of 1920 exercises, every right he has, every liability to which he or the government is subject, is determined by the law which gives him his artificial life, and being, which makes it possible for him to sue and be sued as the representative of the United States government.

While in 1915 Congress passed an amendment providing that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company, upon the ground that the railroad company was incorporated under an act of Congress" (*Bankers Trust Co. v. Texas & Pac. Railroad Co.*, 241 U. S. 295, 60 L. Ed. 1010), the Trans-

portation Act of 1920 contains no provision to the effect that no court of the United States shall have jurisdiction of any action or suit by or against the agent designated by the President under the Transportation Act of 1920, upon the ground that his authority is derived under the laws of the United States. The federal courts not having been deprived of such jurisdiction by a specific act, as in the case of federal railroad corporations, such jurisdiction must still exist as to other legal entities and beings created by an act of Congress. For this reason this action was removable on the ground it arises (as to the agent designated by the President) under the laws of the United States. Likewise for the same reason, the judgment of the Circuit Court of Appeals is not final, and writ of error lies to this court.

U. S. Compiled Statutes 1918, Secs. 1010, 1120, 1218.

Weiland v. Pioneer Irrigation Co., 259 U. S. 498; 66 L. Ed. 1027.

N. P. Ry. v. Soderberg, 188 U. S. 526, 529; 47 L. Ed. 575, 581.

Since the right of removal and appeal existed as to all actions arising under the laws of the United States at the time the Transportation Act of 1920

became effective, since there is no survival of the right to bring actions under section 10 of the Federal Control Act, and since the Transportation Act does not purport to restrict or abolish such right of removal and appeal, it must exist as to all causes of action brought against the agent designated by the President under that act. Defendant in error insists that this suit does not arise under the constitution and laws of the United States, but under section 183, volume 1, Remington's 1922 Compiled Statutes of Washington. The state statute referred to is the usual death statute, providing "when the death of a person is caused by the wrongful act, neglect or default of another, his personal representative may maintain an action for damages against the person causing the death."

Obviously, in the absence of legislation by Congress, the government of the United States could not be sued for a debt, even by an administrator appointed by a Washington court, because the federal government can not be sued without its consent. Without section 206A of the Transportation Act of 1920 the defendant in error would not have any cause of action against the agent designated by the President. The governing principle is succinctly stated by Justice Brewer in *Schillinger v. U. S.*, 155 U. S. 163, 39 L. Ed. 108:

"The United States can not be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent, the courts may not go, no matter how beneficial they may deem, or in fact might be their possession of a larger jurisdiction over the liabilities of the government."

Death cases brought in the state courts and later removed and appealed, have been held to be brought under the laws of the United States.

Pac. R. R. Removal Cases, 115 U. S. 1; 29 L. Ed. 322.

In re Mary Dunn, 212 U. S. 374, 383; 53 L. Ed. 558, 562.

The fact that the railroad corporation was joined with the Agent of the President as defendant at the time the case was removed, in no way restricted the right of removal. A case which arises under the constitution and laws of the United States as to one of the defendants, becomes so as to all. *In re Mary Dunn, ubi supra.*

Since the right of removal and the right of appeal to the supreme court is given by sections 1010, 1120 and 1218 of the Judicial Code (U. S.

Compiled Statutes 1918), in all actions arising under the constitution and laws of the United States, since this is an action arising under a law of the United States, known as the Transportation Act of 1920, and since that act does not either expressly or by irreconcilable inconsistency and repugnancy take away this right of removal and appeal in cases arising under that act, the writ of error herein properly lies, and defendant in error's motion to dismiss the writ should be denied.

II

Defendant in error argues that the writ should be dismissed because the appeal is without merit. It is inconceivable that her counsel should argue, as he does, that the only questions involved are questions of fact. On the other hand, the only questions raised are questions of law. This may be verified by reference to the petition for writ of certiorari and supporting brief, filed herein as Case No. 379.

If writ of error does not properly lie, we see no escape from the conclusion that writ of certiorari should be granted, because this court has always taken jurisdiction of a case in which a lower federal court has refused to accept the construction of a

state statute as interpreted by the highest appellate court of that state. (See authorities cited on pages 28 to 30 of argument in support of petition for writ of certiorari.)

In contravention of a positive statute of the State of Washington (Laws of Washington 1917, Chap. 155, Sec. 9, p. 633, and Laws of Washington, 1915, Chap. 142, Sec. 33, page 396, set out verbatim at pages 7 to 10 of petition for writ of certiorari), and decisions of the Supreme Court of Washington interpreting those statutes (*Peters v. Casualty Co.*, 101 Wash. 208, 172 Pac. 220; *Moore v. Roddie*, 103 Wash. 386, 388, 174 Pac. 648, cited at pages 30 and 10 respectively of the brief and petition for writ of certiorari), the Circuit Court of Appeals has held that while a principal is liable for his agent's original negligence, he is not liable under the same circumstances for his agent's contributory negligence.

Also in contravention of the community property statutes of the State of Washington and decisions of the Supreme Court of that state interpreting those statutes, the Circuit Court of Appeals has held that the contributory negligence of an agent of the community is no defense to an action for injuries received by a member of the community, as a result of the combined negligence of his agent and a third

party (brief on petition for writ of certiorari, pages 43-48).

Deceased was killed at a highway crossing in Washington while riding in an automobile driven by his sixteen year old son, of which an employe, Glen Long, was also an occupant, all three men being killed when the auto collided with a train operated by plaintiff in error. The undisputed evidence was that at the time of the accident the automobile carried a license plate issued by the State of Washington to Mr. Slocomb (Rec. 166, 148, 149, Defendant's Exhibit R). Although defendant in error reported the automobile to the probate court as the property of her husband's estate (Rec. 88, Defendant's Exhibits A, B and C), she testified at the trial that it belonged to the sixteen year old boy (Rec. 86-88). This evidence raised certain legal questions under Washington statutes and decisions of the Washington Supreme Court interpreting those statutes, as to the ownership of the automobile and the liability of the deceased for the contributory negligence of the driver of the car.

The lower court committed the gross error of instructing the jury that plaintiff could recover, even though the accident was caused by the combined negligence of the defendant railroad (plaintiff in

error) and plaintiff's agent (the deceased son who was driving the car).

Defendant in error misleads the court by a discussion of instructions, which do not touch the real point involved. We do not believe the court should be asked on this motion to go into all the questions raised in this appeal. In the few pages that we feel should be devoted to the merits of the case in this brief we cannot discuss all the errors committed by the lower court in instructing the jury on the Washington statutes.

Plaintiff in error requested the following instruction, which is the law of the Washington statute, as interpreted by the Supreme Court of Washington in *Peters v. Casualty Co.*, 101 Wash. 208, 172 Pac. 220.

(For discussion of this question, reference is made to petition and brief in writ of certiorari proceedings.)

"You are instructed that it is conclusively presumed that the deceased, Wilson M. Slocomb, was the owner of the automobile. You need not concern yourselves with the question as to who was driving the automobile at the time of the accident, except, if you believe it was driven by the son Cecil, then you are instructed that you should consider deceased's duty under the circumstances, not only as

owner, but as father of the boy who was doing the driving. The deceased was an occupant of the automobile, and whether it was driven by him or by some other person, he is answerable for the negligence of the driver.

"If you find in this case that the driver of the automobile, no matter by whom it was driven, was negligent, and that his negligence contributed in any degree as a proximate cause to the collision, then I charge you that plaintiff is not entitled to recover, and your verdict should be for the defendant." (Rec. 208.)

This instruction was refused and an exception duly taken. (Rec. 208, 209, 257; assigned as error 273-341.)

It is true, as stated by defendant in error, that the court instructed the jury:

"The law further provides that upon the sale or transfer of title of any motor vehicle, the seller or person who is conveying his interest therein, must remove his number plates therefrom."

This instruction as given meant nothing, because the remainder of the instruction as requested, was not given, the jury not being told what the Supreme Court of Washington has held to be the effect of the failure to remove the number plates. Either the plaintiff in error was entitled under the Washington statute to an instruction that the deceased

was the owner of the automobile, or to an instruction stating what the effect would be of the failure to remove the license plate, if the jury found that it was not removed.

The balance of the instruction as requested, but not given, was:

"A delivery of the automobile, or a change of ownership will not be deemed to have been made, until the seller or party conveying his interest, has removed the number plates. * * * You should also consider whether deceased removed his number plates before he gave the automobile to his son Cecil, if you believe that he did give it to Cecil, and if you find that he did not remove his number plates, then I instruct you that it will be conclusively presumed that the deceased was the owner of the automobile at the time of the accident, and you must disregard the evidence of the alleged ownership by Cecil."

(Rec. 210, as requested, Rec. 246, 247, as given, Rec. 257 exception taken, Rec. 275, 342, assigned as error.)

Defendant in error says that a positive instruction was given, at the request of the plaintiff in error, that deceased, Wilson M. Slocomb, was the owner of the car in which he was killed. We can not understand how such an unqualified statement can be made, because it is not the truth. The trial

court immediately qualified this instruction with the following:

"You are further instructed that the duty owed by deceased as a passenger in the automobile, is in addition to that owed by him as owner of the car. *Well, I would hardly say in addition ,that assumes he was the owner of the car, and that is one of the facts for you to try.*"

(Rec. 248, 249, exception taken Rec. 258; assigned as error Rec. 271, 339.)

Furthermore, plaintiff in error requested the court to instruct the jury as follows:

"If you believe from the evidence that the son Cecil was driving the car, and that he was guilty of negligence which contributed in any degree as a proximate cause of the collision, or that the deceased, Wilson M. Slocomb, was guilty of negligence, either as driver of the car or as a passenger, while his son Cecil or Glen Long was driving the car, which in any degree contributed as a proximate cause to the collision, then I charge you the plaintiff cannot recover, and your verdict should be for the defendant." (Rec. 211; exception taken 257, assigned as error Rec. 276, 343.)

Not only did the trial court refuse to give this instruction, but in place of it gave the following:

"If the deceased, Wilson M. Slocomb, was guilty of no contributory negligence and he had no control over the driver of the car, and the driver of the car was in no way responsible to him, and the car

did not belong to the deceased, and the collision was the result of concurring negligence of both, the railway company in the operation of its train, as complained of in the complaint, and the driver of the automobile, over whom the deceased had no control, and in a car in which he had no interest and exercised no control, the plaintiff would be entitled to recover."

(Rec. 237, exception taken Rec. 255, 256, assigned as error, Rec. 271, 339.)

In other words, this is what the trial court did: It submitted to the jury the question of whether the deceased or his son was the owner of the automobile, when it should have instructed the jury that deceased was the owner. The undisputed evidence was that deceased's license plate was upon the automobile, and under the Washington statutes and decisions interpreting those statutes the plaintiff in error was entitled to an instruction that deceased owned the automobile. Having erroneously submitted the question of the ownership of the automobile to the jury, it then failed to instruct the jury as to the effect of the Washington statute under the testimony as introduced.

Having fallen into this error, it then committed a third and even more prejudicial error by refusing to instruct the jury that there could be no recovery for deceased's death if the son, who was driving the

car, was guilty of contributory negligence, and by instructing, in place thereof, that plaintiff was entitled to recover, even though the son was guilty of negligence, if the son, and not the father, was the owner of the car. This, too, was in violation of Washington statutes and decisions interpreting those statutes.

It is idle to say plaintiff in error did not protect his record by exceptions, properly taken. The citations to the record refute this assertion.

Furthermore, the following colloquy between plaintiff in error's counsel and the trial court, appearing at page 221 of the record, shows the effort that was made to call the Washington statutes and decisions to the trial court's attention:

"MR. MATTHIAS: I would like to call your Honor's attention to a couple of requested instructions, which I passed up, which have to do with the statute of this state with reference to automobile licenses, and a decision which interprets that statute. If your Honor would like to look at the statute I have the citation of it, and also a decision interpreting it.

"THE COURT: You may give them to me and I will look at them during the recess which will come shortly. Counsel may address the jury."

The following statutes and decision were thereupon called to the attention of the court.

Chapter 142, Laws of Washington, 1915; Section 5562-5 R. & B. Code of Washington; Chapter 155, Laws of Washington, 1917; *Peters v. Casualty Company of America*, 101 Washington 208.

The only basis for defendant in error's contention that the jury was instructed as plaintiff in error contends it should have been, is that in reading first from one party's instructions and then from the other party's, the trial court so muddled the questions involved that a dissection and analysis is necessary in order to understand how contradictory, confusing and erroneous the instructions really are. Nevertheless, the error is very glaring and grossly prejudicial. For a more extended discussion of the questions of law involved, we respectfully refer, for the sake of brevity, to the petition for writ of certiorari and brief in support thereof, being Cause No. 379 of the October Term, 1923.

III

The third and last point urged by defendant in error as a reason for a dismissal of the writ of error, is that the appeal was not taken or perfected within the ninety days required by statute.

While final judgment was entered by the Circuit Court of Appeals April 16, 1923 (Rec. 317) petition

was duly and timely filed April 28, 1923, on behalf of plaintiff in error for a rehearing (Rec. 319), which petition was denied by the Circuit Court of Appeals on May 14, 1923. (Rec. 318, 319.)

Therefore, the time within which writ of error could be taken did not expire until August 14, 1923, which writ of error was allowed by Justice Sanford on July 30, 1923, and filed with the clerk of the Ninth Circuit Court of Appeals at San Francisco on August 8, 1923, or within the ninety day period. (Rec. 336, 337).

"The rule is that if a motion or a petition for rehearing is made or presented in season, and entertained by the court, the time limited for a writ of error on appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

Aspen Mining & Smelting Co. v. Billings, 150 U. S. 36, 37 L. Ed. 988.

N. P. Railroad v. Holmes, 155 U. S. 138; 39 L. Ed. 99.

Kingman v. Western Mfg. Co., 170 U. S. 678, 42 L. Ed. 1193.

Texas & Pac. Railroad v. Murphy, 111 U. S. 489; 28 L. Ed. 493.

Simpkins Federal Procedure, pp. 879, 1023.

It has often been held that where the remedy on appeal is doubtful, an application should be made both for writ of error and writ of certiorari, and that upon the hearing on the merits that writ will be dismissed which it is finally determined does not properly lie.

Leser v. Garnett, 258 U. S. 130; 66 L. Ed. 505.

Federal Land Bank v. Crossland, 12 U. S. Supreme Court Advance Opinions, p. 423 (April 16, 1923).

Spiller v. A. T. & S. F. Ry., 253 U. S. 117; 64 L. Ed. 810.

United Drug Co. v. Rectanus Co., 248 U. S. 90; 63 L. Ed. 141.

Union Pac. Railroad v. Board of Comm'rs., 247 U. S. 282; 62 L. Ed. 1110.

It is respectfully submitted that this motion to dismiss should be denied at this time; that writ of certiorari should issue, since the question raised is one of which the court has always taken jurisdiction by certiorari when appeal does not lie, and that the question of which remedy is the proper one be determined at the time the case is heard on its merits.

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EDWIN C. MATTHIAS,
Solicitors for Plaintiff in Error.

Copy of plaintiff in error's brief in response to motion to dismiss writ of error, received this 18th day of September, 1923.

WILLIAM MARTIN,
H. A. MARTIN,
Solicitors for Defendant in Error.